SOME TASKS FOR EDUCATION

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By

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the value, positive or negative, attributable to each such head taken by itself Another obsession, equally strong, which took complete possession of his mind, and if I may say so with respect, almost threw it off its gear, was the idea, bordering very nearly on conviction, that the learned judge had somehow or other led himself to believe that the plaintiff was the second Kumar, and was accordingly determined to find identity at all costs, irrespective of the evidence, which, according to learned counsel, he, therefore, felt no scruples in twisting and torturing to suit his pre-conceived theories As I have said more than once before, there could be no grosser perversion of the learned judge's attitude, as a perusal of the judgment will at once convince any one who approaches the task with a mind free from prejudices and pre-possessions himself

JUDGE'S METHOD OF TREATMENT

Mr Chaudhuri's criticisms notwithstanding, I have been unable to find a single instance in which the learned judge, in his treatment of the present topic, has mis-represented or mis-applied the evidence, or failed to notice any facts or points, however trivial or insignificant, which might be supposed to tell in favour of the defendants He has indeed dealt with the matter so fully and fairly that I do not propose to do more than record my unhesitating concurrence with him on all points In my opinion, he has taken a correct and a common-sense view of the entire evidence on either side, oral, documentary and material, checking and testing it at every step to guard against the possibility of a hasty or wrong conclusion He has tried to reconstruct the body of the second Kumar, as far as such reconstruction is possible, from extant photographs, from recorded details in documents and from his clothes and shoes as well as from the present recollections of persons who knew the Kumar, and then matched the picture with that of the plaintiff as presented in the evidence and as seen in court by himself, forming his opinion not from any single feature or features, but from the whole collocation of them

EVIDENCE OF PHOTOGRAPHS

The learned judge first takes up the points on which photographs throw no light, such as age, height, figure, complexion, colour of hair, moustache and eye-brows, and colour of the eyes (*Vol 18, pp 190-211*), and then turns to the features which can be compared with the help of the photographs, aided by the opinions of experts who have read them, there being 8 different exposures of the second Kumar, and 16 of the plaintiff (*ibid, pp 211-228*) In dealing with the photographs and the expert evidence, as Mr Chaudhuri himself conceded, he is scrupulously careful not to lose sight of the considerations which may be supposed to affect the reliability of this kind of evidence (*ibid, pp 214-216*) A photograph, as he says, is not a map, and he agrees with the defendants' expert Percy Brown, D W 8, that measuring photographs is useless for comparison, and worse than useless, if they are in different scales or at different angles you must go by the eye, meaning thereby no doubt the eye of the trained artist (*Vol 12, p 323, ll 17-19, p 324, ll 22-24 and p 326, ll 16-21*), but as the learned judge rightly observes, what a trained eye sees, an untrained eye can also see, if pointed out (*Vol 18, p 221, ll 17-21*) To ensure absolute fairness of comparison, he looks to both differences and

similarities in the photographs, as according to Percy Brown it is only proper to do (*Vol 12, p 321, ll 23-24*), and is careful to point out which of the features can be definitely regarded as marks of identity, which of them, again, are so in a negative sense in that there is no proved difference, and where there is a difference, whether it is such as may be said to destroy identity The photographs, he finds, while establishing similarity on several points, in fact prove no difference in feature, except only as regards the nose (*Vol 18, p 224, l 2, p 228, ll 1-2 and p 250, ll 33-34*), and on the evidence he is not prepared to hold that this apparent dissimilarity shows a really different nose, so long as it is explicable by the growth of what is called a node, a bony formation which might have been caused by syphilis from which the second Kumar had admittedly suffered (*ibid, p 228, ll 4-24, p 238, ll 17-29 and p 240, l 35—p 243, l 6*)

MARKS

The learned judge next addresses himself to the question of the marks on the plaintiff's body to see how far they may be regarded as evidence of identity (*ibid, pp 228-248*), the most important of these, as I have indicated before, being the irregular scar over the left outer ankle and the scaly feet, not resting on the credibility of any witness

A list of these marks will be found in the notes of an agreed medical examination of the plaintiff which was held on the 14th January, 1936, by three doctors, two appointed by the defendants, Lt-Col Denham White, D W 401 (*Vol 17, pp, 152-167*) and Major Thomas, D W 9 (*Vol 12, pp 336-376*), and one appointed by the plaintiff, Lt-Col K K Chatterjee, P W 1039 (*Vol 17, pp 174-206*) These notes were put in and accepted by both parties as if they were evidence given by the doctors in court, the notes signed by the defendants' doctors (*Ex Z(332 (a), Vol III, pp 340-342*) being prepared from pencil notes taken down by Major Thomas to Lt-Col Denham White's dictation (*Ex Z(332), Vol 17, pp 167-171*), while those of Lt-Col Chatterjee (*Ex 407, Vol III, pp 336-339*), also taken down from Lt-Col. Denham White's dictation, included his own observations made then and there The procedure which was followed by the doctors in conducting the examination and making their notes has been correctly described by the learned judge (*Vol 18, p 227, l 6—p 238, l 15*), and this, by the way, ought to be enough to dispose of any charge of unfairness such as Mr Chaudhuri thought it fit to bring against Lt-Col Chatterjee

NO SUGGESTION OF "MANUFACTURED" MARKS

It is not necessary to refer in detail to the learned judge's discussion of these various marks, or to emphasise the discriminating judgment and scrupulous fairness which he shows in dealing with them One or two general observations will suffice In my opinion, there can hardly be any doubt that these marks, at any rate the majority of them, had been seen by Jyotirmoyee Devi in 1921 about the time of the Declaration of Identity, as deposed to by her (*Vol 8, pp. 284-285, pp 300-301 and p 352*) It was in fact Mr Chaudhuri's own case as put to this witness as well as to the plaintiff himself that these marks were on him at the time, only that counsel suggested that they were being falsely imputed to the second Kumar (*Vol 4,*

p 164, ll 24-25, and Vol 8, p 371, ll 21-23) As the learned judge points out, it was never the defendants' case that any of the marks had been manufactured (*Vol 18, p 320, ll 14-15*) It is worth observing that Satyendra Nath Banerjee himself, though he did not consider the question of marks to be of any importance (*Vol 16, p 443, ll 17-18 and p 444, ll 1-3*), but still airily made the suggestion that scars might be manufactured (*ibid, p 444, l 7*), was ultimately obliged to make the admission in so many words that the marks on the plaintiff were not "fabricated" as the second Kumar's (*ibid, p 444, ll 37-38 and p 445, ll 4-6*) Mr Chaudhuri in his opening accepted the same position, though in his reply he made a half-hearted attempt to go back upon it A suggestion that marks were manufactured would of course carry with it the implication that these were actually present on the body of the second Kumar

DEFENCE DENIAL OF MARKS ON SECOND KUMAR

The only important question to consider in fact would be whether or not the second Kumar bore any of these marks on his person The plaintiff's case from the beginning has been that he did, as is spoken to by the plaintiff himself (*Vol 4, pp 97-98*), by Jyotirmoyee Devi (*Vol 6, p 281-285, p 300, ll 30-34 and p 352, ll 16-19*) and a host of other witnesses on his behalf, but it is significant that none of the defence witnesses deposed that the second Kumar had these or any other distinctive marks on his body

"IRREGULAR SCAR" OVER LEFT OUTER ANKLE

Even as regards the irregular scar over the left outer ankle, which according to the plaintiff had been caused by a carriage wheel accident, and was specifically mentioned as an identifying mark in the second Kumar's medical report in connection with the life insurance proposal (*Ex 230, Vol I, p 175, item 4*), the defendants persisted in making the case that there was no such mark, though they must have had an opportunity of seeing this report as early as the 14th July, 1921, when at the instance of Satyendra, the Board of Revenue had the document brought before them from the Insurance Company along with other insurance papers (*Ex 450, Vol I, p 190*) They were probably hoping that the report would never see the light of day, but it so happened that the plaintiff called for it on the 24th November, 1934, and had it produced from the Company's Head Office in Glasgow on the 15th December following, when of course the existence of the mark could no longer be denied As late as the 3rd September, 1934, however, in answer to a complaint by the plaintiff that defendants' counsel was refusing to make a statement as to whether the second Kumar had a mark on the top of his ankle (*Vol 9, p 497*), they actually put in a petition stating it as their case that the second Kumar had no carriage accident, and further that he had not the mark which the plaintiff had shown on his ankle! (*Vol 10, p 60*)

Long before the existence of the medical report was known to the plaintiff, quite a number of witnesses on his side had, on the other hand, spoken to the fact that the second Kumar had been limping on crutches at about the time of Chota Kumar's wedding when the carriage accident is said to have taken place Quite characteristically, no doubt, Mr Chaudhuri suggested before us that the plaintiff's advisers must have seen a copy of

the insurance paper in the Calcutta office of the Company, and then called for the original from Scotland, but there was not the shadow of a justification for such a suggestion, and he had not in fact dared put it to any of the plaintiff's witnesses, far less to the plaintiff himself or to Jyotirmoyee Devi, according to him the *de facto* plaintiff in the case In any event, this would not explain the wholesale denial of any mark on the second Kumar by Mr Chaudhuri's own witnesses before the arrival of the medical report

LAME ATTEMPT TO SUSTAIN INSURANCE MARK

After the document was produced, as the learned judge points out (*Vol 18, p 233, ll 15-19*), Bibhabati Devi was the only witness for the defence who came to speak about a mark on the second Kumar's body she had noticed only one—what looked like a cut-mark on his left leg above the ankle joint on the outer aspect which was slightly whiter than his complexion and slightly raised above the skin, and was more than 1 inch and less than 1½ inches in length (*Vol 12, p 211, l 35—p 212, l 6*), but this was a very lame attempt to sustain the insurance mark, in denial of the case expressly made on behalf of the defence

MEDICAL EXAMINATION OF PLAINTIFF

While the defendants would thus not admit the existence of any marks on the second Kumar, it is still remarkable how from the beginning they were insisting on an examination of the plaintiff's marks by a doctor on their behalf, the first application for the purpose being made on the day they opened their case, the 6th February, 1935 (*Vol 12, p 78*) Repeated applications in this behalf followed after this from time to time, and it was not until the 7th January, 1936, that an agreed order was made subject to certain terms and conditions set out therein The attitude which the plaintiff took up in the matter was quite proper and intelligible as he explained in his petition of the 8th August, 1935 (*Vol 15, pp 245-246*), he was not unwilling to submit to the proposed examination, but objected to its being held until after the defendants had examined all their witnesses who might be supposed from their intimate acquaintance with the second Kumar to be competent to speak about his marks quite frankly, he did not want to give them a chance of concocting evidence against him through such witnesses At a later stage, on the defendants renewing their prayer, apparently after the close of such evidence on their behalf, the plaintiff by his petition of the 6th January, 1936 (*Vol 17, p 75*) called attention to the fact that none of the defence witnesses had deposed to the existence of any marks on the second Kumar, and on that ground opposed the making of any order for medical examination What followed is set out in order No 1353 of this date (*not printed*), as recorded by the learned judge Rai Bahadur Sasanka Coomar Ghose for the defendants verbally stated his clients' case *the Kumar did not have the marks alleged by the plaintiff*, but if the unlikely event of the court coming to a different finding, they were entitled to show that the marks could not have originated in the way stated! He claimed further that the defendants were entitled to show by an examination of the marks that the plaintiff had not spoken the truth One knows that it does not offend against the rules of pleading to raise inconsistent pleas, but where, as here, the issue is a plain one of fact, marks or no marks, and a clear-cut case

is deliberately made that there are none, one wonders how a party making such a case can in the same breath be heard to say that the marks may have been there, but cannot have been caused in the manner alleged by the other side It is not as if the defendants took up the position that the second Kumar had certain marks on his body, but that they were not the marks alleged by the plaintiff

I am not at all surprised that upon this statement of Rai Bahadur Sasanka Coomar Ghose, Mr Chatterjee on behalf of the plaintiff said that he would advise his client not to submit to any medical examination at the instance of the defendants, adding, however, that he would do so, if the court thought it necessary On the following day, it appears, the parties came to an agreement, and as already stated, a consent order was made This order has not been printed, and it might be just as well to set it out —

"Order No 1356, dated 7-1-36

> Learned counsel for the plaintiff and learned counsel for the defendants Nos 1, 3 and 4 agree that the plaintiff might be examined by a doctor on the date they will fix by agreement with a view to his examination in court as a witness for the defendants Nos 1, 3 and 4 on the points mentioned in the defendants' petition filed on 23-3-35 (*Vol 12, p 331*), and one other point, namely, the alleged node on the shin-bones deposed to by a witness for the plaintiff It is agreed that the marks on the insurance paper will be examined, and these are the vaccination marks and an irregular scar on top of the left outer ankle as described by words to that effect on the paper
>
> The plaintiff will be at liberty to have another doctor in attendance at the time of such examination which will be limited by the purposes of the petition, dated 23-3-35, and supposing the two doctors differ in their observations or in their theories, both doctors will be examined, if tendered Each doctor will be at liberty to have an assistant present, if he so chooses As agreed, either party may have a lawyer in attendance, but the plaintiff will be entitled to object to their presence during examination of his private parts"

It was in pursuance of this arrangement that the joint medical examination took place, the marks being pointed out to the doctors by the plaintiff himself.

GENERAL CHARACTERISTICS

Apart from the bodily features and marks, the learned judge considers certain general characteristics, such as gait, expression of the face and voice, as tests of identity, which they undoubtedly are (*Vol 18, pp 248-250*), and in addition to this, he calls attention to the fact that the shoes fit, and so also do the old clothes of the second Kumar (*ibid, pp 193-194*)

It will be thus seen that in dealing with the question of physical identity, the learned judge has not left unexplored a single point of detail appearing in the evidence which might throw any light on the matter in dispute, and in the result, he has in my opinion arrived at a conclusion which cannot but be regarded as absolutely fair and proper I need only draw attention to his admirable summing up of this chapter of the case, in the course of which he has very conveniently set out the points of similarity in respect of the marks and bodily features in the form of a table (*ibid, pp 250-252*)

Mr Chaudhuri ridicules the learned judge because he says later on that the identity of the body has been "proved to demonstration", and "with mathematical certainty" (*ibid, p 423, ll 37-38*), but it only means, as he explains by reference to the bodily features, all exceptional, and by the bodily marks, all exceptional, which rest on nobody's credibility, that these in their totality can never occur in a second individual and "if the chance of each of the items occurring in a second individual is represented by a fraction, the chance of all these occurring in another is the product of these fractions, and any one with a sense of mathematical odds would see that it is nil" (*ibid, p 251, l 36—p 252, l 3*)

"MATHEMATICAL CERTAINTY"

Whether or not the learned judge was right in imputing "mathematical certainty" to the plaintiff's proof of physical identity, it is somewhat remarkable that the defendants, though they were not content merely with saying that the plaintiff was not the second Kumar, but made the definite case that he was a Punjabee peasant of the name of Mal Singh of Aujla who afterwards assumed the name of Sunder Das when he became a sannyasi, did not yet attempt through any of their Punjab witnesses, Mohar Singh and others (*Vol 3, pp 374-421*), or through their Bawa Dhaiam Das (*D W 327, Vol 16, pp 51-58*), to show that this man had any of the marks which were admittedly to be found on the plaintiff's body, far less to prove how they might have been caused on the other hand, the fact remains that most of these witnesses who were asked about it very significantly pleaded their ignorance of any such marks Thus, Mohar Singh said "I cannot tell any mark of identification of Mal Singh's body" (*Vol 3, p 376, ll 43-44*) so did Ujagar Singh "I cannot say any distinctive mark on Mal Singh's body" (*ibid, p 387, l 40*) Mahana Singh "I cannot tell any mark of identification except that Sundar Das is tattooed on his left arm" (*ibid, p 396, ll 36-37*) Wasan Singh "I cannot give any distinctive mark on Mal Singh's body" (*ibid, p 403, ll 22-23*) and Wazir Singh "Mal Singh was Nanga (naked) then and besmeared with ashes I cannot give any distinctive mark on the body of Mal Singh, but Mal Singh showed me his left arm and told me that there was Sunder Das and Dharam Das written there", which, by the way, was wrong, as the tattoo-mark did not contain the name Sunder Das at all (*ibid, p 413, ll 34-37*) What a pity these witnesses should thus deprive Mr Chaudhuri's clients of the chance of proving the defence case to "mathematical demonstration"!

Before quitting the subject of physical identity, one cannot help observing that by the defendants' own token as applied by them to establish the supposed identity of the plaintiff with Mal Singh of Aujla, the plaintiff should win hands down, if one might use this non-forensic expression

MIND OF THE PLAINTIFF

It remains now to consider the last, but none the less a most important, chapter on the question of identity—the mind of the plaintiff, a topic which Mr Chaudhuri complains the learned judge has relegated to a secondary position, though there could be nothing further from the truth The complaint is apparently based on a certain remark occurring in the judgment to the effect that "the question of identity is primarily a question of the identity of the body" (*Vol 18, p 126, ll 4-5*), but as the context shows, this is just the opposite of what the learned judge indicates to be his own view

He says quite plainly that one may identify a dead man or a mad man, which is no doubt done only from physical features, but where a question as to identity has arisen and the evidence about bodily features is conflicting, one would look to the mind as a determining test, the mind being "as individual as the body", and "impossible to confound with another, if sufficiently searched" (*ibid, p 126, ll 5-8*) Where, however, as in the present case, he adds, rightly or wrongly, the mind is "deliberately left unexplored", the body necessarily "becomes the principal consideration" (*ibid, p 126, ll 8-11*) This certainly does not show that the learned judge on his part was anxious to turn away from an examination of the mind, or that he was not fully alive to the importance of investigating the complex group of facts going to make up what might be called mental identity On the other hand, he almost makes it a grievance himself that learned counsel for the defendants would not follow up this particular line of enquiry for his own purposes And yet it is obvious, if the plaintiff was an impostor, it should have been far easier for the defence to expose the dissimilarity in mind than for the plaintiff to establish similarity in that respect

TEST OF MENTAL IDENTITY HOW TO BE APPLIED

There can be no doubt that for a proper application of the test of mental identity, the first essential would be to get a correct picture of the personality of the second Kumar as he was,—to make sure about the facts of his life, his education, his environments, his style of living, his habits and pursuits, in fact about all that might be said to make the sum and substance of the individual man, for, it is against these that would have to be set the knowledge and recollections of the plaintiff to see how far they were genuinely those of the person he represented himself to be Identity could no more be established by depressing the second Kumar below his true level than it could be defeated by raising him any higher in either case, this would mean the setting up of an imaginary standard for comparison which could not possibly be a guide to a right conclusion

Once the standard was correctly set, and the Kumar re-created in the image of the man he was, the next question would be one of judging the answers given by the plaintiff in the witness box in a fair and proper way,—neither requiring too much proof on the one hand, nor being satisfied with too little on the other, as Lord Chief Justice Cockburn cautioned the jury in the Tichborne trial The object should be to ascertain whether and to what extent the answers represented his real unaided memory or knowledge,—the test to be applied being what is it that the second Kumar, if living now, might be expected to remember, making allowance for the imperfections of human memory, and not trying to test the memory of one by the standard of another? and how far, again, are his recollections to be discounted by the fact that he had sources of information at hand from which he might have derived all the knowledge which he exhibited?

I am unable to hold that in dealing with the question of mental identity, the learned judge permitted himself to lose sight of any of the considerations I have indicated If he did not yet find it possible to come to a conclusion favourable to Mr Chaudhuri's clients, it was not because of any failure on his part either to appreciate or to apply the right principles in this branch of the investigation, but because the facts and circumstances of the case refused to yield such a result Neither as regards his portrayal of the real Kumar as he was in life, nor as regards his findings as to the knowledge

displayed by the plaintiff of the facts of the Kumar's life, am I prepared to say that the learned judge took an "impossible" or incorrect view of the evidence on record

IMAGINARY KUMAR SET UP BY DEFENDANTS

It is definitely his view that Mr Chaudhuri conjured up a wholly imaginary Kumar in his cross-examination of the plaintiff, which, in so far as it was intended to defeat the plaintiff, was thus a mere futile shooting beyond the mark it would, as he says, have defeated the real Kumar himself (*Vol 18, p 259, ll 1-3*), the supposed ignorance which counsel claimed to have brought out being not real ignorance at all On the few points on which, according to the learned judge, he presumed to touch reality, the plaintiff is said to have given correct answers almost in every instance, the exceptions where he failed being in his opinion not at all material (*ibid, p 260, ll 16-22 and p 275, ll 5-26*)

The cross-examination, as the learned judge points out (*ibid, p 124, l 28—p 125, l 5*), apart from trying to establish that the plaintiff was not a Bengalee,—a topic which he deals with separately (*ibid, pp 421-422*),—was aimed at showing that he was not educated at all, and that he knew nothing of football, tennis, cricket, polo, billiards, nothing of guns or *shikar*, nothing of horses and horse-races, nothing of English clothes, English meals, or English articles of furniture, nothing of photography, or of music and singing As against this, the Kumar, as visualised by learned counsel, was the Kumar put to one of plaintiff's commission witnesses, Satya Dhenu Ghosal, —a "well-educated, well-polished young Bengalee aristocrat" (*Vol 14, p 3, ll 15-16*), a "thorough-going sportsman", as put to P W 945, Jatindra Nath Lahiri (*Vol 10, p 403, l 18*), elegant as a "Raja's son", as put to various witnesses (e g , *P W 112, Vol 5, p 93, ll 21-22, P W 402, Vol 6, p 436, ll 7-8, P W 433, Vol 7, p 5, l 32, P W 461, Vol 7, p 142, ll 1 and 7-8*), accustomed to English clothes, English meals, speaking English, and living in English style (*Vol 18, p 125, ll 22-27 and p 252, l 35—p 253, l 14*)

It is not difficult from the cross-examination to form an accurate idea of what the plaintiff was like—of his ways of living, his habits and pursuits, his speech and manners, the extent of his literacy or of his knowledge of sports or amusements, and the whole question is how far he may be supposed to have come up to the standard of the real Kumar as he was, or was likely to have been, if he was living at this date The learned judge admits that, apart from anything else, if it was shown that the Kumar was a well-educated man, and knew English, it would mean an end of the plaintiff's case (*ibid, p 253, ll 43-44 and p 256, ll 8-9*), just as he says, on the other hand, that if it appeared that the Kumar was absolutely illiterate, except that he could achieve his signature in English and in Bengali in certain forms, it would be an end of the cross-examination (*ibid, p 256, ll 9-11 and p 260, ll. 28-30*)

AVOIDANCE OF MEMORY IN CROSS-EXAMINATION

Mr Chaudhuri was indignant because the learned judge ventured to suggest that counsel had studiously tried to avoid the memory in his cross-examination of the plaintiff, but one cannot help feeling that the indignation was only a cover to conceal what he must have known was nothing but the

barest truth The criticism, he protested, was as unjust as it was unfounded, but curiously enough, while he was so emphatic in denying the charge, his arguments before us only sought to find an explanation for it Quite early in his opening, in fact, he thought it right to remind us of the difficult position which counsel cross-examining the plaintiff found himself in in this case by reason of its peculiar facts On the one hand, it was said, the Kumar's was a short and uneventful life, singularly lacking in a rich background of incidents and materials, while on the other, it was pointed out, the plaintiff came into the box after long years of close and intimate association with the members of the family, having all the time been surrounded by a multitude of old servants and dependants, and publicly exhibited and interviewed by all and sundry as the second Kumar, the centre in fact of a ceaseless propaganda, thus opening up to him diverse channels of information regarding the facts and events of the Kumar's life, and affording also abundant time and opportunities for immaculate tutoring

It was inevitable in these circumstances, counsel complained, that the plaintiff had to be cross-examined only on such things as he was not likely to anticipate, things which tutoring could not reach, quoting the famous dictum of Lord Chief Justice Cockburn that in such cases the ignorance of yesterday very often became the knowledge of to-day

Whether this was or was not a valid excuse, it was certainly an admission that the plaintiff was not questioned about many matters which might otherwise have afforded a good and valuable test of memory, and this is precisely what the learned judge had the temerity to point out I do not pretend to know much about the art of cross-examination, and have no right to pit my little or no experience in this line against the acknowledged authority of learned counsel for the defendants, but it does seem to me to be curious, as it did also to the trial judge (*Vol 18, p 259, ll 9-11*), that the supposed tutoring of a witness should be deemed a ground for withholding cross-examination. Equally extraordinary appears it to be, speaking again with due deference, that counsel should want it to be understood at the end of the cross-examination that he did not admit any statements on points as to which he had not specifically questioned the plaintiff (*Vol 4, p 176, ll 1-2 and Vol 18, p 124, ll 24-27*) I shall not pause to consider if the authority which Mr Chaudhuri cited before us, *Browne* v *Dunn*, (1893) 6 Reports, 67, H L, lends the vestige of a support to the course he adopted

If Mr Chaudhuri so strongly resented the suggestion that in cross-examining the plaintiff he had left the memory unexplored, equally bitter was he against the learned judge for his presuming to express the further opinion that the cross-examination had only a fictitious Kumar for its background Not only did he vigorously repudiate the criticism, but he turned round and said that this itself was a fiction invented by the learned judge in order to justify the plaintiff after the utter collapse to which he had been reduced under the withering fire of counsel's cross-examination,—a collapse which, it was pointed out, made it necessary for the plaintiff himself to call a mass of false evidence afterwards, aimed at bringing the real Kumar down to his own level, thus giving a very much poorer picture of the Kumar than that presented by the plaintiff's earlier witnesses

DEFENCE PICTURE OF THE REAL KUMAR

As usual, it is Mr Chaudhuri's attack on the learned judge, and not the learned judge's attack on him that turns out to be unfounded Taking the

question of education and literacy alone, one is tempted to ask whether the "well-educated, well-polished young Bengalee aristocrat" put to S D Ghosal was a mad phantasy of the learned judge, or the array of English terms so pompously paraded in the course of the plaintiff's cross-examination a fanciful emanation from the same source One asks, again, who was responsible for that amazing document (*Ex 468, Vol III, pp 219-275*), so vividly described by the learned judge (*Vol 18, pp 257-258*) and so aptly referred to by him as a "lesson-book" of Pham Bhusan Banerjee (*ibid, p 32, ll 8-10 and p 162, ll 12-14*),—a storehouse of the supposed details of the Kumar's life, from which the witness (D W 92) was expected to build up a refined English-knowing and English-speaking nobleman, as familiar with English dishes as he was fond of English sports and English society

A "WELL-EDUCATED, WELL-POLISHED ARISTOCRAT"

Mr Chaudhuri tried no doubt to make out before us that in putting his case of a "well-educated, well-polished aristocrat" to S D Ghosal, he did not mean what he said, but while nobody suggests that he was ascribing book-learning and culture to the Kumar by these words, one finds it difficult to agree that the phrase he used had reference only to manners, and not to education at all Quite inconsistently, though quite inaccurately, counsel went on to accuse the learned judge of having shut his eyes to the fact that witness' answer to the question was "yes", as if he meant thereby to subscribe to the Kumar's description as a "well-educated" Bengalee, whatever that expression might connote In point of fact it will be seen the witness refused to do so, sticking to what he had already said, touching only the Kumar's manners

> "When I first met the Kumar of Bhowal, I found him in manners and conversation just like a man of his position and status" (*Vol 4, p 3, ll 13-14*)

Then followed the question, paraphrasing the answer, but quietly introducing the words "well-educated" into it

> "*Q*—That is, you found him to be a *well-educated*, well-polished young Bengalee aristocrat?"

But the witness was too wary to walk into the trap

> "*A*—I had only an ordinary conversation with him and I found him quite gentlemanly in speech and manners" (*ibid, ll 15-18*)

One can understand this attempt of learned counsel to save his cross-examination of the plaintiff by toning down his fancied image of the second Kumar, as it is possible also to appreciate the desperate efforts which, as the learned judge points out (*Vol 18, p 125, ll 30-31*), the defendants afterwards made to prove a bare literacy and a bare ability to speak English, though, it may be added, not without a struggle at times to keep alive a pale shadow of the Kumar of Mr Chaudhuri's earlier version But all this only lends weight and substance to the comments of the learned judge against which counsel so vehemently protested

Looking at the matter from another point of view, it seems to me that the standard which the plaintiff set of himself *qua* the second Kumar in the witness-box is, on the defendants' own case, a refutation of the picture as conjured up by Mr Chaudhuri If there was any truth in that picture, is it at all likely that those who were out to pass off a counterfeit imitation

should have produced such a hopeless caricature? Admittedly, the plaintiff had about him persons, the sister and other relations and associates, who must have known all about the second Kumar and his educational and other attainments, and if the standard set up by Mr Chaudhuri was at all correct, it is hard to believe that these persons would not or could not have trimmed up their *protege* at least to a near approximation to that level, so as to avert the disaster of a certain crash in cross-examination According to Mr Chaudhuri, to put it in his own picturesque phraseology, there was the evolution of the plaintiff from the chrysalis of a naked sadhu to the full-grown butterfly of a Kumar, and yet, supposing he is right, all this laborious process ended in producing a butterfly without its wings!

KUMAR'S LITERACY AND EDUCATION

Mr Chaudhuri suggested at one stage that the plaintiff's propounders had deliberately avoided teaching him how to write lest he might in the process of learning develop characteristics of his own which would betray him at once, but apart from the fact that this would not explain why he could not still have been taught how to read to the supposed standard of the second Kumar, learned counsel apparently forgot that there should have been in that case no occasion for a change in the plaintiff's case all his witnesses, those who had come before him and those who came after, should equally have known the precise calibre of the second Kumar which they were expected to speak to With all respect to Mr Chaudhuri, he seems to my mind to have taken up an absurd position the plaintiff had been fully coached and tutored,—that is the excuse which counsel gave for not questioning him on many points, and still in the matter of reading and writing, he had been left untouched, in order that at the very first touch of the cross-examiner he might stand exposed in all his bareness, the illiterate Punjabee peasant he was!

NO CHANGE OF CASE ON PLAINTIFF'S SIDE

The fact is that Mr Chaudhuri had pitched his own cross-examination so high that he himself left the plaintiff wholly untouched, and I have not the slightest doubt, as the learned judge points out (*Vol 18, p 266, ll 4-5*), that so far as the plaintiff's advisers are concerned, they put him into the box exactly as he was in 1921 As for a change of case, this was on the defendants' side, and not on that of the plaintiff, and it is utterly misleading to suggest that any of his earlier witnesses had conveyed an idea of the second Kumar's literacy or education so widely at variance with the picture he gave of himself during his examination as to have necessitated the calling of false evidence later on to support his own A reference to the evidence of some of these witnesses should be a sufficient answer —

Kamal Kamini Devi (in cross-examination) *Vol 1, p 495, ll 7-15,*

Sudhangshu Bala Devi (in cross-examination) *Vol 2, p 237, ll 25-26 and p 247, ll 1-2,*

Tara Prosad Chowdhury (in examination-in-chief) *Vol 2, p 326, ll 1-6* (in cross-examination) *p 343, ll 5-15,*

Nundo Lall Guin (in cross-examination) *Vol 3, p 221, ll 31-33,*

Bepin Behary Chakravarty, P W 1 (in cross-examination) *Vol 4, p 29, ll 30-33 and p 31, ll 12-13,*

Surendra Mohan Adhikari, P W 2 (in examination-in-chief) *Vol 4, p 33, ll 22-25* (in cross-examination) *p 35, ll 5-13,*

Harish Chandra Nandi, P W 3 (in cross-examination) *Vol 4, p 41, ll 3-23,*

Radhika Mohan Goswami, P W 4 (in examination-in-chief) *Vol 4, p 45, ll 10-13* (in cross-examination) *p 51, ll 6-28 and p 52, ll 7-11,*

Suresh Chandra Mukherjee, P W 5 (in examination-in-chief) *Vol 4, p 55, ll 24-29* (in cross-examination) *p 62, ll 36-39, p 63, ll 4-8 and ll 19-23, and p 64, ll 7-8,*

Ganga Charan Banerjee, P W 8 (in examination-in-chief) *Vol 4, p 79, ll 12-14* (in cross-examination) *p 82, ll 35-37 and p 83, ll 7-8,*

Jitendra Behary Mukherjee, P W 9 (in examination-in-chief) *Vol 4, p 87, ll 23-30, p 88, ll 10-11* (in cross-examination) *p 90, ll 38-41 and p 91, ll 3-8*

The definite case which the plaintiff made, and from which there was no deviation in the evidence either of his earlier or of his later witnesses, was that the second Kumar had just learnt enough to be able to spell out his Bengali and English signatures by his own unaided effort (*Vol 4, p 95, ll 10-12 and p 149, ll 21-32*), and that thereafter, as he said, assuming he was the second Kumar, he gradually forgot all the learning he had acquired except that he retained his capacity for making his English and Bengali signatures mechanically (*ibid, p 150, ll 7-8, p 168, ll 20-26, p 169, ll 1-16, p 172, ll 21-34 and p 173, ll 3-33, and Vol 18, p 280, ll 13-17*)

VARYING VERSIONS OF DEFENDANTS

As far as the defendants are concerned, their case is represented at one end by the "well-educated, well-polished young Bengalee aristocrat" put to S D Ghosal (*Vol 4, p 3, ll 15-16*), and at the other by the "tea goden gan" of D W 433, R C Sen, being all the effort in "broken English" which, according to witness, the second Kumar showed himself capable of, to say "tea garden gone", in speaking to an Englishman in his presence at the Viceroy's Cup races in 1905 (*Vol 17, p 372, ll 33-34 and p 373, ll 7-12*) In between, besides D W 92, Phani Bhusan Banerjee with his "lesson-book", was Bibhabati Devi herself to hear the second Kumar talking English "at many places" (*Vol 12, p 209, ll 28-29*), and even talking "fluently" with the "Sahib doctor" to explain his disease (*ibid, p 290, ll 4-6*), and there was also of course her redoubtable brother to say that he had heard him speak English not only with Mr Meyer and Mrs Meyer, Mr Wharton and Mr Heard, and some of the "firingi" (Eurasian) employees, but even "in every day conversation with us", using, however, on such occasions only "some words of English" (*Vol 16, p 425, ll 7-11*) the Kumar, according to this witness, would talk English "as an educated man would", but not, he was willing to add, "as a highly educated man" (*ibid, p 538, ll 3-4*),—a rather feeble effort to tone down Mr Chaudhuri's "well-educated Bengalee" to the level counsel would like to postulate!

Satyendra pretended to be even familiar with the English handwriting of the second Kumar (*ibid, p 425, ll 12-13*), and shown a promissory note executed by the latter on the 1st April, 1905, for a loan of Rs 10,000/-, which the defendants had called for from the High Court (*Ex Z(199), Vol I, p 195, and Photo Album, Vol II, p 39*), he had not only no difficulty in identifying

the signature on it, but also said that the words "Ten thousand" below the signature were in the Kumar's handwriting (*Vol 16, p 425, ll 15-16*), "written as an educated man would write", as he afterwards added in cross-examination (*ibid, p 438, ll 6-9*) Whether, however, they were actually written by the Kumar or not, the writing itself shows, as will appear from the facsimile in the photo album, that the writer could not spell the word "thousand" obviously he did not know the letter "u", and achieved what looks like a "w" in trying to write it, and was probably going to add another "w", when somebody must have stopped him This certainly does not look like the writing of an "educated man", but if anything, only confirms the Kumar's inability to spell even simple English words, furnishing incidentally one more illustration of the fact that every document that happens to get on the record helps the plaintiff's case

I consider that the patent fact which was admitted by Mr Chaudhuri himself that the plaintiff had not been taught either the English or the Bengali alphabet is enough to give a death-blow to the story that the second Kumar was "educated", even if he could not be regarded as "well-educated"

FORGED BENGALI LETTERS PRODUCED BY DEFENDANTS

If the second Kumar was really literate and knew how to write, it is surprising that excepting a few signatures, only one in Bengali and the rest in English, the defendants were unable to produce a single scrap of writing in his hand from the papers and records at the Rajbari or other likely places, leaving aside no doubt a batch of 9 letters supposed to have been written by him, 8 to his wife Bibhabati Devi and 1 to her sister Provabati (*Ex Z(142) series and Z(143), Vol I, pp 90-97 and 99, photo prints in photo album, Vol I, pp 34-42*), which have been fully dealt with by the learned judge and rightly held by him to be forgeries (*Vol 18, pp 292-297*) Curiously enough, the defendants had filed these Bengali letters in court in a sealed cover, not to be opened until the examination-in-chief of the plaintiff was over (*Order No 203, dated 19-1-32, Vol 1, p 16*), a proceeding for which Mr Chaudhuri was unable to offer any explanation, except to say that the object was to prevent the plaintiff from obtaining specimens of the signature to serve as models from which he might learn to copy Counsel forgot that the plaintiff could not take photographs or make copies of the documents without notice and without the order of the court He forgot also that if the plaintiff might procure models for his English signature before December 1926 when he submitted his memorial to the Board of Revenue which contained as many as 18 such signatures, it is only reasonable to suppose that he could obtain Bengali models as well, independently of the specimens which the defendants filed in court only in 1932 Then, again, he overlooked that none of these letters contained full signatures of the second Kumar, and that as such they would be useless as models

Speaking of these Bengali letters, which, as I have said, the learned judge finds to be spurious, I might perhaps draw attention to the fact that in all of them the *rafala*, or the right to left horizontal stroke indicating the addition of "*ra*", in the last compound letter "*ndra*" of the word "Ramendra", uniformly ends in a characteristic hook, which visibly distinguishes the signatures therein from the easy curve of the *rafala* in the admitted signature of the second Kumar in *Ex 2 (Photo Album, Vol I, p 1)*

The more one looks into the facts and circumstances of the case, the more is one convinced, on the one hand, of the correctness of the view taken by the learned judge regarding the cross-examination of the plaintiff, and on the other, of the futility of Mr Chaudhuri's criticisms of it Learned counsel himself made an important admission, which seems to me in fact to go a long way in establishing the plaintiff's case it is that in cross-examining him, he had purposely avoided putting him questions on matters on which he was likely to have been tutored or to have acquired knowledge from adventitious sources The answers, therefore, which the plaintiff gave to such questions as might be considered to have been a legitimate test of memory have an unquestioned and unquestionable significance of their own, and as the learned judge points out, the plaintiff hardly failed on any of these Truly enough, as Lord Chief Justice Cockburn observed, the ignorance displayed by the claimant in such cases matters more than the knowledge which he may exhibit, but I am certainly not prepared to say that the plaintiff here betrayed any such fatal ignorance, whether on matters which touched real memory (*Vol 18, pp 275-278*), or on topics of general interest (*ibid, pp 260-275*), making due allowance of course for possible lapse of memory, the ignorance of terms as distinguished from things being obviously of no consequence

JUDGE'S CONCLUSIONS ACCEPTED

Each of these questions, including those of literacy (*ibid, pp 278-297*) and handwriting (*ibid, pp 297-304*), has been separately and fully dealt with by the learned judge, and though Mr Chaudhuri has canvassed them over again in his own way as hard and in as elaborate detail as he could, I for one, sitting here in a court of appeal, cannot persuade myself to hold that either the learned judge's appreciation of the evidence or any of his findings thereon has been shown to be so perverse, arbitrary or clearly wrong that it should be set aside I deem it right, on the other hand, to say, on an independent examination of the evidence, giving to Mr Chaudhuri's arguments every consideration that is due, that I have come to the same conclusions as the learned judge on all the material points in controversy

IS THE PLAINTIFF A BENGALEE?

On the question as to whether the plaintiff is a Bengalee or not, which the learned judge considers as a separate topic towards the end of his judgment (*Vol 18, pp 414-422*), I fully agree with him that the cross-examination on this point was mostly a play on words designed to confuse and confound rather than to elicit facts showing true knowledge or the want of it, and I find it unnecessary to say more than that I unhesitatingly accept his conclusions The outstanding fact remains that the plaintiff gave his evidence in Bengali, Bhowali Bengali as it was, in the presence of a Bengalee judge, and with a Bengalee counsel pitted against him who was only too alert to have forgiven a single lapse on the part of the witness

Taking the cross-examination as a whole, it is my definite opinion that the plaintiff stood his ground remarkably well, establishing his mental identity as completely as no impostor could ever hope to do, certainly as none in recorded legal annals had ever done before

FINAL CONCLUSION ON ISSUE OF IDENTITY

In the result, there is in my considered judgment no possible getting away from the conclusion arrived at by the learned judge that the plaintiff is Ramendra Narayan Roy, the second son of the late Raja Rajendra Narayan Roy of Bhowal (Vol 18, p 427, ll 12-13)

This, then, disposes of the two main issues of fact in the case, namely, issues 4 and 5, on both of which, therefore, the decision must be in favour the plaintiff and the judgment of the court below fully upheld

DEFENCE CASE OF PLAINTIFF BEING A PUNJABEE

Arising out of and in connection with the question of identity, there was the specific case which, as already stated, was made by the defendants at the trial, if not in their pleadings, to the effect that the plaintiff was a man named Mal Singh of Aujla, a village in the district of Lahore in the Punjab, who afterwards came to adopt the name of Sunder Das on his initiation as a *sannyasi*

The defendants were not of course called upon to make any definite case in this behalf, but they chose to make one, as they were certainly entitled to do, and if they succeeded in proving it, they would no doubt have demolished the plaintiff's claim almost as effectively as by proof of the second Kumar's death and cremation at Darjeeling For if the plaintiff was Mal Singh of Aujla *alias* Sunder Das, he was not and could not be Kumar Ramendra Narayan Roy of Bhowal, though the converse of the proposition did not hold, for the plaintiff might not be this man from the Punjab, and yet might not be the Kumar of Bhowal

Agreeing with the learned judge, I hold that the defendants have signally and miserably failed to prove this part of their case If I am not mistaken, learned counsel for the appellants himself placed but half-hearted reliance on it in the course of his arguments I have had occasion already to make some references to the Punjab enquiry, and if I do not propose to discuss it any further, it is because the learned judge has dealt with it very fully in his judgment (*Vol 18, pp 402-414*), and it will serve no useful purpose to repeat his reasons and conclusions with which I find myself in entire accord In their attempt to prove the supposed real identity of the plaintiff, the defendants have only convicted themselves of chicanery and fraud of the worst description, the details of which have in fact been clearly unravelled by the court below In any case, the proof of such identity did not purport to rest on anything more than dubious recognition from mere photographs

QUESTION OF LIMITATION

As in my opinion the defendants must fail on the merits, it becomes necessary to consider whether they can successfully resist the suit on the ground of limitation, which was in fact made the subject of a specific issue, issue No 2 The learned judge has dealt with the question very briefly, but to my mind quite adequately, in the concluding part of his judgment (*Vol 18, p 428*), holding that the suit is not barred by limitation Mr Chaudhuri did not argue the point in court, but handed in a very full note on the subject, as he also did on other important topics in the case, no doubt with notice to the respondent accompanied by copies of such notes

It will be material to bear in mind the following dates —

8th May, 1909	Supposed death of the second Kumar
4th May, 1921	Declaration of identity by the plaintiff as the second Kumar
3rd June, 1921	Lindsay's notice declaring the plaintiff to be an impostor
30th March, 1927	Resolution of the Board of Revenue rejecting the plaintiff's memorial for setting aside the impostor notice
24th April, 1930	Date of institution of the present suit

It may be stated at once that the question of limitation will have to be decided on the allegations in the plaint The plaintiff will, therefore, have to be assumed as the second Kumar

AMENDMENT OF PLAINT

The suit as originally framed was one for a declaration that the plaintiff is the second Kumar and for a permanent injunction on defendant No 1, Bibhabati Devi, to restrain her from interfering with the plaintiff's possession of an one-third share of the Bhowal Raj Estate By a petition filed on the 19th February, 1931 (*Vol 1, pp 248-249*), the plaint was sought to be amended by adding a prayer for confirmation of possession, and alternatively, in the event of the plaintiff being found not to have been in possession, for recovery of possession The plaint already contained a statement that the plaintiff was in possession of an one-third share of the estate by realisation of rent from tenants, and the amendment did not, therefore, introduce a new case By order No 99 dated the 15th April, 1931, the then learned subordinate judge (not the judge who afterwards heard the suit) allowed the amendment (*ibid, pp 9-11*) The amendments have for the sake of convenience been printed in red ink in the paper-book (*ibid, pp 119-120 and 124-125*)

On these facts, the first point made by the appellants is that apart from the alternative prayer for recovery of possession introduced by the amendment, as contained in clause (*ka 1*) of paragraph 13 of the plaint, the suit is a suit for declaration of identity and title and of actual present possession, and that such a suit is governed by article 120 of schedule I of the Indian Limitation Act, which provides a limitation of six years for all suits not specially provided for elsewhere, time to run from when the right to sue accrues The right to sue here, it is said, accrued on the denial of the plaintiff's identity by the defendant No 1, that is to say, on the issue of Lindsay's impostor notice of the 3rd June, 1921, this notice being alleged in paragraph 4 of the plaint to have been published "as the result of a conspiracy of defendant No 1 with her brother and *at their instigation*" The averment in paragraph 12 of the plaint that the cause of action arose from the 30th March, 1927, the date of rejection of the plaintiff's memorial by the Board of Revenue, and that it has continuously arisen after that, is challenged as wrong in law

SUIT GOVERNED BY ART 144

In my opinion, there is no substance in the appellants' contention, and that for the following reasons —

(i) For purposes of limitation it will not do to refer to the plaint as originally framed, but the plaint as amended will have to be

looked to The prayer for possession cannot be put aside as an unnecessary prayer on the ground that there is no allegation in the plaint that if the court granted the declaration of identity asked for, the defendant No 1 would still resist the plaintiff in recovering, or continuing in, possession The whole basis of the plaint is that the defendant No 1 was wrongly interfering with the plaintiff's possession and otherwise denying his right to it, although she knew him to be her husband

(ii) The suit was not merely one for declaration of identity, even as originally framed, but also asked for a permanent injunction On the allegations in the plaint, this was a continuing cause of action

(iii) It should be further noted that the plaintiff made the definite case that he was in possession by realisation of rent from tenants

It is next urged that the addition of the alternative prayer for possession did not take the suit out of article 120 This argument is again based on the view that the only allegation against defendant No 1 is that she claimed to hold the estate as a Hindu widow this assumes that if the plaintiff was able to prove that he was the Kumar, it would give him all the relief that he needed As already pointed out, this is an entire misreading of the plaint The fact that defendant No 1 raised a plea of adverse possession in her written statement itself shows that the prayer for possession was not at all an unnecessary one

I hold that article 120 has no application to the case, but that it is governed by article 144

On this the defendants' case is that the possession of Bibhabati became adverse to the plaintiff from May 9, 1909 This is sought to be supported on the ingenious plea that a Hindu widow takes as an heir to her husband, and that there can, therefore, be no question of defendant No 1 purporting to have represented the plaintiff, while holding the estate from after his supposed death, as held by the learned judge A widow's estate, it is said, cannot co-exist with a living husband the moment, therefore, she assumes possession as a widow and an heir, there is an effective ouster of the person whose widow and heir she claims to be This is all casuistry On her own case, the defendant No 1 was claiming title and possession through or under her husband *ex hypothesi* there was no intention to exclude the husband, if it turned out that he was not dead In my opinion, the possession of a Hindu widow cannot be adverse to the husband, any more than to the husband's reversioner, as such possession is not and cannot be in denial of the right of the husband

The defendants cite the authority of an American case *Pearce* v *French*, quoted *in extenso* in Wood's Limitation, in support of the proposition that even if a party has been in possession under an honest mistake that he is entitled to the property and without any desire of depriving the real owner, time nevertheless runs and extinguishes the title of the real owner on the expiry of the statutory period It is not necessary to hold that possession under a mistaken belief may not amount to dispossession in the eye of law the very act of possession, though under an honest mistake, may be an assertion of title by the possessor and the denial of the title of all others, and as has been pointed out by the Judicial Committee in *Secretary of State for India* v *Debendra Lal Khan*, (1933) L R 61 I A 78, it is sufficient that the possession be overt and without any attempt at con-

cealment and need not be brought home to the knowledge of the rightful owner All the same, the principle contended for by the defendants, while it may hold good as between the true owner and a stranger, cannot, in my opinion, apply as between the true owner and a person who admittedly claims to hold as an heir of the true owner under a mistaken belief that the true owner is dead

It is not necessary to pursue the matter further I hold that the learned judge was right in the view he took on the question of limitation

CONCLUSION

I have now completed my review of the case I cannot say I have touched upon all points, nor that I have dealt with all points with equal fulness, but I believe I have said enough to show why I concur with the learned trial judge in his findings on the broad facts of the case, upon which, and not upon trivialities, must the decision ultimately depend

It has been no easy task for the learned judge to disentangle these broad facts from the unparallelled mass of details with which the main stream of narrative was choked at every step, and as I have said before, he has considerably lightened the burden of the appellate court by the manner in which he has accomplished that task I have read and re-read his judgment several times over, and it is no small tribute to the care, thoroughness and vigilant attention he brought to the consideration of the case that I was unable to trace a single error of fact in his statements even on questions of small detail, barring a few obvious slips When I think of the time I have taken in preparing my judgment, I cannot but be filled with admiration for the learned judge who was able to produce his in less than half that time, and be it remembered, was able to do so without the exceptional facilities of the printed record which were available to this court It is needless for me to remark once again on his appreciation of the evidence in the case which I have had occasion to refer to several times before it is enough to state that it has been so fair and full that sitting in appeal I should not feel justified at all in interfering with his findings on questions of fact It may be that every appeal from a judge trying a case without a jury may be regarded in one sense as a re-trial, but where there is nothing to show that the trial court misdirected itself on any point, it is not the function of the appellate court to come to a contrary decision As I have already shown, in my opinion the judgment of the learned judge does not show any misdirection

Before leaving the case, I should like to express my acknowledgments to learned counsel on both sides for the ungrudging and valuable assistance they gave to the court, not only by their full and copious arguments, but by the still fuller notes and references they supplied

I must say a word also in commendation of the staff of this court for their excellent work in the difficult matter of the preparation of the printed record, which they completed in a little over twelve months' time The number of errors or omissions noticed in the paper-books during the hearing was almost negligible

The execution of the prints in the Photo Albums has been of a particularly high standard

I desire also to acknowledge the assistance I derived from the stenographers of this court who helped in typing out my judgment to my dictation, among whom Mr Haradhon Mukherjee and Mr Panikar deserve special mention

BISWAS, J 'S SUPPLEMENTARY STATEMENT
27th August, 1940

BISWAS, J —It remains now to refer to a matter affecting the delivery of judgment in this appeal The appeal, as I stated before, had been heard by a Bench of three judges which the Chief Justice had specially constituted for the purpose, though under the rules of this court a Division Bench of two judges would have been fully competent to deal with it It so happens that under circumstances not anticipated at the time this special Bench was appointed, judgment has had to be pronounced now with two only out of the three judges who had heard the appeal present in court The facts are these —

The hearing commenced before us three on the 14th November, 1938, and continued practically without a break *de die in diem* till the 14th August, 1939, a period of full nine months, representing a total of 164 sittings of the court After the hearing was over, there were barely 13 working days left before the court dispersed for the Long Vacation on the 31st August, 1939 The senior member of the Bench, Costello, J , then left for England, having taken a fortnight's leave in continuation of the vacation On the re-opening of the court on the 16th November following, he was accordingly absent While in England, he afterwards extended his leave from time to time, with the result that he has not yet returned, and it is uncertain whether he will do so at all before he retires, his retirement being due in normal course some time next year

COSTELLO, J 'S JUDGMENT SENT OUT FROM ENGLAND

In these circumstances, our learned colleague has sent out from England what is evidently meant to be his "judgment" in the appeal, which was in fact received by the Registrar of this court on the 17th August last As I announced at the commencement of delivery of my own judgment, it will be my duty to read it out in open court in due course, but up to now neither my learned brother, Lodge, J , nor I have seen it, nor have we had any knowledge of its contents

Before Costello, J , left for England, I placed him in full possession of the conclusion I had reached in the case as a whole, tentative, of course, as it was at the time, and equally did my learned brother Lodge, J intimate to him the opinion he had formed Our learned senior, however, did not indicate to us which way he was inclined or how he proposed to dispose of the appeal, and we broke up in this state of uncertainty, no *final* decision, whether by way of agreement or disagreement, having been reached as a result of our joint discussions

This was unfortunate, as Lodge, J and I happened to differ in our conclusions On being apprised of our views, as stated, our learned leader occupied himself for the next few days mainly in dictating the introductory portion of a judgment, containing in more or less non-committal terms a bare narrative of the conflicting cases of the parties and of the arguments advanced by their counsel in this court

Before we finally dispersed, however, it was arranged, in case Costello, J 's return was delayed or he might not find it possible to return at all, that we should both send him our draft judgments embodying our respective views

My learned brother Lodge, J was able to complete the writing of the substantial portion of his judgment before Christmas of 1939, and a copy of his draft was mailed to Costello, J in or about the last week of December that year So far as I was concerned, I regret to state that the preparation of my judgment was delayed very much longer than I had anticipated, and for this I have no apology to offer except the judgment itself It is enough to state that with all my efforts, I could not get it finally ready before the middle of June this year Portions of my judgment, however, as they were completed, were despatched to Costello, J from time to time by air, the last two instalments having been mailed on the 18th and 25th of May, 1940 This carried the judgment up to the end of the Darjeeling chapter No further instalments were sent, as it was understood at the time that there was a likelihood of his returning, if he was able to secure a passage out to India This expectation, however, failed to materialize, and he accordingly sent out from England about the end of June or the beginning of July the "judgment" to which I have already referred

I believe, but cannot be positive that my learned brother had received all the instalments of my judgment which had been sent to him before he completed his own I may state that the last instalment which was mailed on the 25th May dealt with Rescue, while the portion despatched just before that on the 18th May contained the discussion on the subject of the morning cremation, undoubtedly one of the most important topics of the Darjeeling chapter It is clear he had not before him my views on the question of Identity

Though no final decision was reached at a joint conference in the sense I have indicated, before Costello, J left for England, I should perhaps be justified in saying, judging from the indications he had given while here, that his views, tentative as they were, were in accord with the conclusions I had come to and have since expressed in my judgment

The fact that Lodge, J and I have not found it possible to agree undoubtedly lends a special importance to the opinion of Costello, J , as it should have for this reason a determining effect on the result of the appeal Not as a matter of form, but as a matter of substance, therefore, it is essential to consider if that opinion should not have been formed and expressed at a final conference with his colleagues

A FULL BENCH RULING

As Sir Barnes Peacock observed in the Full Bench cases of *Mahomed Akil* v *Asadun-nissa Bibee* and *Mutty Lall Sen Gywal* v *Deshkar Roy*, (1867) 9 Weekly Reporter 1, at p 29, it is not a mere technical requirement, but one founded upon a fundamental principle essential to the due administration of justice, that every judicial act which is done by several judges ought to be completed in the presence of the whole of them In his opinion, the learned Chief Justice went on to say, a final judgment ought not to be pronounced by a court consisting of several judges in a case in which they differ, until by conference and discussion, they have endeavoured to arrive at an unanimous judgment If, after discussion and after deliberately weighing the arguments of each other, the judges cannot agree, their several judgments ought to be delivered in open court in the presence of the others

The head-note of the case as reported would seem to suggest as if it decided that if some of the judges who had heard a case ceased to be judges

of the court before judgment was pronounced, any written opinions they might have left in court before their retirement, whether intending them to be their judgments or not, could not be treated as judgments in the case, but must be regarded as mere minutes or memoranda But as Markby, J pointed out in *Mussamat Parbati v Mussamat Bhikun*, (1872), 8 B L R 98 (Appendix), referring to the Full Bench decision, it was a mere accident that those judges afterwards left the court before the case was finally disposed of, and that circumstance had no bearing on the matter at all, except that it rendered the matter irremediable What was stated to have been held in that case was, that where there are several judges who had to give their opinion in a case, the mere handing in to the Registrar by a judge of his own opinion, without there having been any final consideration by all the judges as to what their final decision was to be, was not a judgment As the learned judge put it quite clearly, the decision in that case proceeded upon this that in order to there being a final judgment of the court, there must have been a final meeting and consideration by all the judges who heard the case as to what their judgment was to be

It is this fundamental basis that what Costello, J has sent out as his "judgment" may be said to be lacking, and the question arises, how far this might go to affect its validity as a judgment It may be stated that there has been no further discussion between him and us by correspondence since he left, or since he received our draft judgments

QUESTIONABLE VALIDITY OF THE JUDGMENT

Having given the matter my best consideration in the light of the Full Bench case referred to above, the conclusion I have come to is this if I am right in believing, as I do, that Costello, J's tentative views were in accord with those I have expressed, *and if it turns out now he has since revised his opinions*, the absence of an opportunity by further discussion and argument to have influenced his final judgment would indeed be a matter of consequence, affecting the final result of the appeal In that case, if I have correctly interpreted the Full Bench ruling, it would not be a matter to be brushed aside as a mere technicality, but be an objection striking at the very foundation of the so-called judgment, or opinion, as I should prefer to call it

And when it is added that at the time of writing it out, my learned brother had not had with him the printed record of the appeal, either the oral or the documentary evidence, except only the volume containing the judgment of the trial court, and except, as I gather, some notes of his own (fairly copious) which he had made before leaving for England, the legal value of such a judgment would seem to be all the more dubious

NEW RULE

I am not unmindful that with a view to meet the contingency of a judge being absent from the court at the time of pronouncement of judgment, this court, in exercise of the power vested in it under section 122 of the Code of Civil Procedure, has recently framed a new rule, with the approval of the Provincial Government, as required by section 126, making an amendment in the provisions of the First Schedule to the Code This rule which

is to be added as rule 4 to Order XLIX, and which came into effect on the 15th August last, the date of its publication in the *Calcutta Gazette*, is as follows —

> "A judge of the High Court may pronounce the written judgment or opinion of any other judge of the said court signed by him when such judge continues to be a judge of such court but is prevented by absence or any other reason from pronouncing that judgment or opinion in open court"

It is not necessary to consider the scope or validity of this rule, or some of the questions which seem to arise on the face of it whether, for instance, it is or is not inconsistent with the provisions in the body of the Code, or whether the words "continues to be a judge of such court" in the rule exclude a judge who is on leave, or whether, again, where the Chief Justice constitutes a Division Court for the hearing of a particular appeal in exercise of the power conferred by section 108 of the Government of India Act, 1915, a power which has been preserved by section 223 of the present Government of India Act of 1935, this rule would or would not cure the defect in the constitution of such Division Court, if on a proper construction of the provisions of these Acts or of the Letters Patent, a defect may be supposed to arise by reason of the absence from the court of one of the judges composing it Suffice it to say that the question here, as I apprehend the matter, would not be the technical objection of Costello, J 's judgment being pronounced by one of the other judges in his absence, but one of a more fundamental character the question, namely, whether or not in the circumstances it would be a valid "judgment" or "opinion" which could form the basis of a "decision" under section 98 of the Code of Civil Procedure or clause 36 of the Letters Patent, whichever of these provisions might apply

Having considered the matter carefully, I should say, as at present advised, that the answer to this question should be in the negative The opinion of Costello, J should in that event be excluded from consideration, and following the precedent of the Full Bench case in 9 Weekly Reporter 1 referred to above, the present appeal should be disposed of on the basis of the opinions of the remaining members of the Bench

As such opinions are equally divided, it should perhaps be our duty, if clause 36 of the Letters Patent applies, to state the points upon which we differ They are the points covered by issues 4 and 5 of the suit



Mr Justici Lodge

LODGE, J 'S JUDGMENT

LODGE, J —The material facts giving rise to this litigation are briefly these

Ramendra Narayan Roy was the second son of Raja Rajendra Narayan Roy of Jaidebpur in the district of Dacca On the death of Raja Rajendra Narayan Roy, Ramendra and his two brothers Ranendra Narayan Roy and Rabindra Narayan Roy succeeded jointly to the very large estate known as the Bhowal Raj Estate At the time when this story opens all three brothers were alive Ramendra Narayan Roy was suffering from syphilis He visited Calcutta during the cold weather of 1908-09, and apparently during this visit, it was arranged that Lord Kitchener, who was the Commander-in-Chief in India, should visit Jaidebpur for a shoot

After Lord Kitchener's visit, Ramendra Narayan Roy decided to go to Darjeeling for a change He was accompanied by his wife, Bibhabati Devi, and her brother Satyendranath Banerjee The party also included Mukunda Guin, Private Secretary of Ramendra Narayan Roy, and Dr Ashutosh Das Gupta, the family physician, and a large number of servants The party stayed at a house called "Step Aside" which had been taken for a period of three months

They arrived in Darjeeling on April the 20th, and shortly after their arrival Ramendra Narayan Roy fell ill The exact nature of his illness is disputed, but it was sufficiently serious to induce Dr Ashutosh Das Gupta to call in Dr Calvert, Civil Surgeon of Darjeeling, in consultation Dr Calvert came on the morning of May 6th At some time on the night of May 8th, 1909, Ramendra Narayan Roy was taken for dead, and on the following morning, a body said to be his was taken out in procession and was burned to ashes at the Hindu cremation ground

The remaining members of the party left Darjeeling on the tenth of May on their return to Jaidebpur

One day in the cold weather of 1920-1921, the present plaintiff appeared on the Buckland Bund, Dacca, in the guise of a sannyasi, with matted hair and ash-besmeared body, and naked save for a loin cloth He remained on the Buckland Bund for some weeks, staying out in the open in all kinds of weather, seen and consulted by hundreds of people In the month of May, 1921, on the fourth of the month to be exact, he declared to a gathering of relatives of the Jaidebpur family and villagers that he was Ramendra Narayan Roy who was thought to have died at Darjeeling in 1909

PLAINTIFF'S CASE

The questions in issue in this appeal are, whether the plaintiff is indeed Ramendra Narayan Roy, son of Raja Rajendra Narayan Roy of Jaidebpur and whether the suit is barred by limitation The plaintiff's case is that his brother-in-law Satyendranath Banerjee conspired with the Secretary Mukunda Guin and Dr Ashutosh Das Gupta to poison him In furtherance of this conspiracy, Dr Ashutosh Das Gupta administered some poison to the plaintiff on the night of May 7th, 1909 Thereafter all the symptoms of arsenic poisoning developed, and the plaintiff collapsed and was taken for dead about dusk on May the 8th Arrangements were at once made for the cremation

and the plaintiff's body was taken from "Step Aside" at about 9 P M to the cremation ground Just as the funeral party reached the cremation ground, there was a violent storm Everybody fled, leaving the body still tied to the cot on which it had been carried Fortunately, four naked sannyasis were sheltering in a cave near the cremation ground They had heard the cries of 'Haribole' as the funeral party were approaching the cremation ground, and were surprised at the sudden cessation of the cries One of them came out of the cave to see what had happened He heard a sound like a moan or groan coming from the cremation ground and went to see what it was

Then all four sannyasis went to the spot, and found that plaintiff was still alive They untied the ropes which bound him, and carried him to their cave Then in fear lest the funeral party should return, they decided to leave the cave and take shelter in a hut further down the hill They carried the still unconscious plaintiff down the hill to another hut These sannyasis nursed the plaintiff back to life They remained near Darjeeling for about a fortnight, and thereafter, accompanied by the plaintiff, continued their wanderings through the length and breadth of Northern India The plaintiff soon recovered physically, but when he became conscious it was found that he had completely lost his memory He had no idea of his identity, his home or his condition in life In fact he became like a child again

After wandering for about a year, plaintiff recovered to the extent that he was to all outward appearance a normal adult except in one respect all memory of events before his cremation and rescue had been completely wiped out

In this condition he wandered for many years in the company of the sannyasis Suddenly one day he remembered that his home was at Dacca, and told this to his Guru The Guru at once assumed that plaintiff's memory was entirely restored, and advised the latter to return to his home and his relatives Thereupon plaintiff left the sannyasis and started home for Jaidebpur In this condition he reached Dacca and took up his position at Buckland Bund While at Dacca his memory was completely restored

Even after his memory was restored, he was at first reluctant to reveal his identity He visited Jaidebpur and stayed for some days at the house of Jyotirmoyee Devi, the second daughter of the late Raja Rajendra Narayan Roy Jyotirmoyee Devi and other members of the family recognised him and pressed him to admit that he was Ramendra Ultimately on the fourth of May, 1909, plaintiff yielded to their entreaties and admitted his identity

The plaintiff's further case is that his wife Bibhabati Devi is aware of his identity, but, in order to shield her brother Satyendranath Banerjee, is falsely denying that plaintiff is her husband

DEFENDANTS' CASE

The defendants are Sarajubala Devi, widow of Ramendra Narayan Roy, Bibhabati Devi *sei disant* widow of Ramendra Narayan Roy, Ananda Kumari Devi, widow of Rabindra Narayan Roy, and Ram Narayan Roy who was adopted by the above Ananda Kumari Devi as son to her deceased husband Rabindra Narayan Roy All four defendants were ultimately represented by their guardian, the Court of Wards, though one of them, Sarajubala Devi, supported the plaintiff's claim and deposed in his favour The other three defendants opposed the plaintiff's claim and asserted that he was an impostor set up by Jyotirmoyee Devi, daughter of the late Raja Rajendra Narayan Roy and by other designing persons

The defendants' case is that Ramendra Narayan Roy was suffering from biliary colic when at Darjeeling and that Dr Calvert was called in to treat him Dr Calvert wished to give morphia injections when the spasms of pain came on, but Ramendra Narayan Roy refused to have an injection because of his belief that his mother's death had been caused by such an injection On account of his obstinate refusal, adequate measures to relieve the pain could not be taken in time Ramendra Narayan Roy ultimately consented to the injection, it is true, but the pain had been so severe that he collapsed and ultimately died just before midnight on the eighth of May It was too late to cremate the body that night, and accordingly, the body was taken out in procession on the following morning and burned to ashes after the usual ceremonies had been observed The further case for the defendants is that the plaintiff is a Punjabee who was unable to speak Bengali when he first appeared at Jaidebpur in the year 1921, and they have attempted to prove that his real name is Mal Singh of Aujla in the Punjab A more detailed statement of the case for the parties will be given as the evidence regarding each group of incidents is discussed

The suit was filed in the court of the Subordinate Judge at Dacca Mr Panna Lal Basu was specially selected to hear the suit During the hearing Mr Panna Lal Basu was promoted to the rank of District Judge and appointed to be Additional District Judge of Dacca The suit was accordingly transferred to the file of the Additional District Judge and the hearing continued before Mr Panna Lal Basu as before This transfer explains the re-numbering of the documentary exhibits in the case

The learned trial judge in a detailed and carefully written judgment came to the conclusion that the plaintiff's claim was true and decreed the suit with costs Against that judgment and decree, three of the defendants have appealed The appellants are—

Bibhabati Devi, *son-dasant* widow of Ramendra Narayan Roy,
Ram Narayan Roy, adopted son of the late Rabindra Narayan Roy, and
Ananda Kumari Devi, widow of the late Rabindra Narayan Roy

The remaining defendant, Sarajubala Devi, widow of the late Ranendra Narayan Roy, has been made a pro-forma respondent in the appeal

LIMITATION

As stated above, the second question in issue in this appeal is the question of limitation In view of my findings on the question of identity, it is not necessary for me to deal at length with the question of limitation

Suffice it to say that, in my opinion, a Hindu woman in possession of property of her husband in the honest belief that her husband is dead and that her possession is that of a Hindu widow, must be regarded as in possession on behalf of her husband, if that husband is in fact alive In this view, if plaintiff is indeed Ramendra Narayan Roy he must be regarded as having been in possession of his share until his identity was denied The suit was instituted with 12 years of that denial, and therefore, in my opinion, was not barred by limitation

ATMOSPHERE AT DACCA DURING TRIAL

In opening the appeal before us, Mr Chaudhuri, counsel for the appellants, asserted that during the trial in the lower court, the precincts of

the court were crowded daily with a mob of enthusiastic supporters of the plaintiff who made no attempt to hide their approval or disapproval of each piece of evidence as it was given hostile demonstrations against counsel for the defence and the defence witnesses were of frequent occurrence news sheets were printed daily in the town of Dacca, and these sheets often contained offensive lampoons on the supporters of the defendants

Mr Chatterjee, counsel for the respondents, has not denied the accuracy of this description It is clear that such an atmosphere was not conducive to a calm judicial determination of the issues involved Passions were aroused, and feelings ran very high Either for this reason, or perhaps because the parties were uncertain at the beginning, what facts they would challenge and what they would admit, every statement made by one party was flatly contradicted by the other, whether the statement was of importance or not Evidence was adduced in support of assertion and contradiction without any consideration of its relevance and importance As a consequence hundreds of witnesses were examined whose depositions cumber the record without adding in any way to our knowledge of the material facts

DIFFICULTIES CREATED BY THE PARTIES

It is obvious that if the evidence of recognition or non-recognition given by intimate friends of Ramendra Narayan Roy fails to carry conviction, the evidence on the same point given by tenants who had few opportunities even of seeing Ramendra, and no opportunities of intimate association with him cannot add anything to our knowledge Yet tenants have been examined in hundreds either to shew that plaintiff is exactly the same in appearance as Ramendra Narayan Roy, or to show that there is no resemblance whatever This accumulation of unnecessary evidence has merely added to our difficulties in coming to a proper conclusion Another of our difficulties was also created by the parties to the suit It is clear from the documentary evidence produced that officers of the Court of Wards, employed in the management of the Bhowal estate, attempted to bring pressure to bear on employees and tenants of the estate to deter them from supporting the plaintiff and from deposing in his favour Attempts were also made to win over those who had already joined the plaintiff's party Conduct of this nature merits the severest condemnation, and in view of these facts, it is impossible to attach any value to the evidence of those tenants and employees of the estate who have deposed against the plaintiff It is clear that it was to their advantage so to depose

The suggestion, however, that the estate was not justified in dismissing from service those employees who openly supported the plaintiff, nor in instituting certificate proceedings against tenants who were in arrears with their rent and who supported the plaintiff, seems to me quite unreasonable I cannot understand the argument that an employer of labour is morally bound to retain in his service an employee who openly supports a pretender and who acts against the interests of his own employer Nor can I understand the argument that a tenant who has the money with which to pay his rent, but who gives that money to a pretender to the estate and then defaults in payment to the owner in possession, is entitled to any consideration from the latter There can be no possible doubt that agents of the defendants behaved most improperly in attempting to prevent people from deposing on behalf of the plaintiff, but it would be a mistake to assume that they were the only sinners in this respect Witnesses who ventured to depose on

behalf of the defendants were subjected to insult both inside and outside the court Offensive questions were put to them in cross-examination for which there was no justification whatever Charges of sodomy, lechery and conspiracy to murder were recklessly levelled at them The inference is that there was a deliberate attempt by these means to deter witnesses from deposing for the defendants

In this as in other respects, it seems to me that both parties were guilty of serious misconduct Neither party came into court with clean hands In this view of the case I am unable to hold that the misconduct of a party is an indication of the falsity of that party's case The misconduct to which I have referred has added considerably to our difficulties it does not indicate in any way, on which side truth lies

TRIAL COURT'S UNSATISFACTORY MODE OF APPROACH

Before dealing in detail with the evidence about particular incidents, I desire to make a few observations on the manner in which the lower court approached the problem and the reasons why I consider that approach unsatisfactory, and in doing so, I think it desirable to indicate generally, why I am unable to accept the learned judge's estimate of the credibility of witnesses One of the outstanding features of this case is the fact that Jyotirmoyee Devi has accepted the claimant and has acknowledged him to be her brother Ramendra Since 1921 Jyotirmoyee Devi has lived in close contact with the plaintiff and has had innumerable opportunities of testing his claim After living with him for more than a dozen of years she has deposed unhesitatingly to the effect that he is indeed her brother Ramendra There can be no doubt that this evidence is the strongest evidence in the plaintiff's favour It is difficult to believe that a sister could possibly live for twelve years in the same house with a man who claimed to be her brother without finding out whether his claim was true Mr Chatterjee for the respondents has gone so far as to argue that if Jyotirmoyee Devi's evidence was honestly given, it was sufficient to establish beyond doubt the truth of the plaintiff's claim The learned trial judge was not prepared to accept this argument, but he did concede that if Jyotirmoyee Devi was honest, her evidence would go a long way to establish plaintiff's claim In the circumstances, the question whether or not Jyotirmoyee Devi was honest in her deposition, is one of the greatest importance

HONESTY OF JYOTIRMOYEE DEVI

An appellate court is at an obvious disadvantage compared with a court of first instance, in attempting to decide whether a witness was deposing honestly or not The court of first instance has the advantage of watching the witness as he or she gives her evidence and observing the manner in which the evidence is given It is not possible to note down all the details which go to impress the court in favour of the witness or against him An appellate court will, therefore, hesitate long before deciding that a particular witness who has been believed by the court of first instance, has not deposed honestly

As the learned trial judge has believed the evidence of Jyotirmoyee Devi, it is incumbent on this court as an appellate court carefully to examine the reasons given by the learned judge before rejecting his conclusions

NO ADEQUATE REASONS FOR ACCEPTING HER EVIDENCE

The learned judge gave three principal reasons for believing Jyotirmoyee Devi's evidence Firstly, he thought that the possibility of a Brahmin lady supporting the claim of an impostor to be her brother was so remote as to be almost incredible, secondly, he thought that there was no opportunity for Jyotirmoyee Devi and her associates to hatch the conspiracy alleged by the defence, and thirdly, he was impressed with the manner in which she gave her evidence I propose to examine these reasons with some care

It must be remembered that both parties have put forward stories which are strange and unusual, if the plaintiff is indeed Ramendra Narayan Roy, it follows that there must have been a conspiracy between his own secretary, his own private physician and his own brother-in-law to murder him, there must have been an apparent death and an almost miraculous resurrection, there must have an extraordinary rescue and an unaccountable loss of memory, there must have been a most unusual sham cremation on the following morning, and finally, there must have been denial by a Brahmin lady of her own husband Such a sequence of events is undoubtedly sufficiently rare to justify the description improbable

On the other hand, if the plaintiff is an impostor, it follows that Jyotirmovee Devi and her associates must have conspired to set him up they must have undertaken to coach him in the part he was to play, and to persuade the world that he was the real Kumar This too seems improbable in the extreme

Where one of two parties puts forward a story which is outside the ordinary course of human experience, and the other party maintains that things happened in a perfectly ordinary normal manner, the mere improbability of the one story may justify its rejection But, where the alternative to one improbability is another equal, or even greater, improbability, the mere strangeness of the story is not sufficient reason for its rejection

In the present case the learned trial judge dealt first with the evidence of recognition In this connection he noted the improbability of Jyotirmoyee Devi conspiring to set up an impostor, but he failed to compare this improbability with the improbability of the plaintiff's story He failed to notice that the alternative was another improbability as great, if not greater It is true that when the learned judge came to discuss other parts of the evidence he noticed the improbability of the plaintiff's story, but having by then accepted the plaintiff's identity as established, he was constrained to believe the story however improbable it seemed

As the learned judge made no attempt to compare the two stories and decide which was the less improbable, the argument that Jyotirmoyee Devi's evidence was worthy of belief because otherwise her conduct was so unusual as to be considered improbable is obviously fallacious

The second argument advanced by the learned judge was that there was no time in which to hatch out such an elaborate and daring plot This argument is based on the assumption that neither Jyotirmoyee Devi nor her associates could possibly have thought of this plot until after the plaintiff's second visit to Jaidebpur commenced This assumption is wholly unjustified There is nothing in the circumstances of the case to preclude the possibility

that the plot in its main outlines had been decided on before even the plaintiff set foot in Jaidebpur ' The mere absence of evidence to show that conspirators were plotting, is no proof that they could not possibly have been so engaged When I discuss the evidence on this point, I shall have occasion to point out that there was certainly sufficient opportunity for the conspirators to develop their plot

The third argument—and ordinarily the most difficult argument for an appellate court to reject—was that the evidence of Jyotirmoyee Devi impressed the learned judge as honest evidence But on closer examination, this argument too is found to be unconvincing An appreciable part of Jyotirmoyee Devi's evidence related to the rumours said to be current in Jaidebpur between 1909 and 1921 to the effect that Ramendra Narayan Roy was alive and wandering about in the company of sannyasis, and to steps taken by members of the family to verify these stories Jyotirmoyee Devi described how messengers were sent in many directions to find her brother, and how these messengers returned with definite and convincing evidence of his survival She added that from the information so obtained she was convinced that her brother was alive, long before the plaintiff's appearance in Dacca, and it is obvious that if her evidence regarding these searches and the reports of her agents is true, she must have been absolutely convinced that her brother was alive The learned judge, however, has found definitely that whatever rumours were current, they produced no action whatever, and that Jyotirmoyee Devi did not really believe that her brother was still alive, she merely hoped against hope

Implicit in these two findings of fact is the third finding that Jyotirmoyee Devi was not always truthful and that she was quite capable of giving false evidence if she thought it necessary In other words, the manner in which she deposed did not convince the learned judge that she was invariably truthful he drew his conclusions regarding her veracity not from her manner, but from the substance of her evidence We are in as good a position to appreciate the substance of her evidence as was the lower court, and we need not start with the handicap of a finding based upon her attitude in the witness box, which we could not verify

DIFFERENTIAL TREATMENT OF EVIDENCE ON EITHER SIDE

In this connection, it is desirable to point out that the learned trial judge did not apply the same standard to both sides in estimating the value of their evidence

In cross-examination of Satyadhenu Ghosal, counsel for the defence put the question "That is, you found him to be a well-educated, well-polished young Bengalee aristocrat?" It is now virtually conceded that this was much too high an estimate of the education and culture of Ramendra Naravan The learned judge noted that a number of witnesses were examined for the defence to support this exaggerated estimate and held rightly that their evidence was untrue to the knowledge of the party producing them The learned judge not without reason took the view that this conduct in deliberately adducing false evidence must raise a doubt as to the veracity of the defence evidence on other points

The learned judge also noticed that the plaintiff himself gave evidence which could not possibly be true, *e g*, to the effect that he could not count, and that witnesses were examined on his behalf to support this untrue state-

ment In other words, the plaintiff's party were guilty of a similar offence to that committed by the defendants This is merely an illustration It is impossible to read the evidence on either side without coming to the conclusion that each party deliberately adopted a false standard, in the one case too high, in the other too low—and adduced false evidence to prove their case and a perusal of the judgment shews that the learned trial judge was well aware that this was so

Proved perjury on the part of some defence witnesses was held to justify suspicion regarding the veracity of other defence witnesses But similar proved perjury on the part of some witnesses for the plaintiff was regarded as an inexplicable phenomenon not only did it furnish no justification for suspicion regarding the veracity of other witnesses for the plaintiff, it did not even affect the credit of the witnesses who committed the perjury

This difference in treatment—this application of different standards to the evidence according as it was given in support of the plaintiff or of the defendants—is noticeable throughout the judgment, and detracts considerably from the value of the learned judge's estimate as to the reliability of the various witnesses

ORDER OF TREATMENT

A problem that presents itself at the very outset, is In what order shall we deal with the incidents in this case and the evidence relating to them?

The learned trial judge, after setting out in full detail the history of the family and the allegations of the parties, dealt first with the evidence of identification, and noted that almost all the relatives of Ramendra Narayan Roy have accepted the plaintiff Thereafter he considered the evidence of identity of physical characteristics, noted that some marks on the plaintiff agree with marks known to exist on Ramendra Narayan Roy and held that no difference between the two had been proved which could not be explained by the mere passage of time The learned judge next considered the evidence of mental identity and last of all, took up the evidence regarding the incidents in Darjeeling in the year 1909

In my opinion this is not the most satisfactory manner of approaching the problem It is obvious that the value of the evidence regarding recognition depends to a very large extent on the honesty of Jyotirmoyee Devi and the members of her family If her acceptance of the plaintiff was honest, that fact alone would go a long way to convince the court of the truth of his case, if her acceptance was found not to be honest, that finding alone would justify the court in scrutinising the other evidence of recognition with a most critical eye

In this view of the case, the whole conduct of Jyotirmoyee Devi from 1909 onwards must be examined in order to determine whether her acceptance of the plaintiff was honest or not it is not sufficient merely to note the improbability of her being dishonest and the manner in which she deposed If, of course, there were convincing evidence coming from independent and reliable sources, of a large number of peculiar physical and mental characteristics of Ramendra Narayan Roy, which agreed (or disagreed) with those of the plaintiff, it would not be necessary to rely on general evidence of recognition But in the present case the independent evidence of such characteristics is exceedingly meagre and far from conclusive

I am, therefore, of opinion that the only satisfactory way of dealing with the different episodes is to take them as far as possible in chronological order, and I propose, therefore, to consider first the evidence regarding the illness of Ramendra Narayan Roy at Darjeeling and the apparent death, next, to consider the evidence of the alleged evening cremation and alleged rescue, and next, the evidence of the admitted morning cremation and the return of the party to Jaidebpur Thereafter I propose to consider the plaintiff's evidence as to his conduct during the years between 1909 and 1921, and the conduct of the people at Jaidebpur during the same period Then I propose to consider the evidence dealing with the plaintiff's appearance at Dacca and Jaidebpur and the conduct of those persons who met him and either recognised him or failed to do so Thereafter I propose to deal with evidence of identity of physical and mental characteristics, and lastly, to consider the evidence adduced by the defence to prove that plaintiff is a Punjabee

DARJEELING—ILLNESS

The first question for our consideration is, therefore, what was the illness of Ramendra Narayan Roy which caused his apparent death?

The plaintiff's case is that he was not seriously ill at any time before May the 8th He alleges that he was given some noxious drug on the night of May the 7th, which produced all the symptoms of acute arsenic poisoning and which resulted in his apparent death some time between 7 and 8 P M on May the 8th

The defendants, on the other hand, assert that Ramendra Narayan Roy was suffering from biliary colic from the 6th of May, but that he refused to accept the Doctor's advice and have morphia injections as he was under the impression that such injections had caused his mother's death The pain from the biliary colic was so great that Ramendra Narayan collapsed and died at about midnight on the 8th of May

MATERIALITY OF CAUSE OF DEATH

At first sight it would seem to be a matter of no importance in the present case whether Ramendra died of arsenic poisoning or of biliary colic But though the cause of death does not matter if he did indeed die, the time at which he was taken for dead has turned out to be a matter of the very greatest importance

It is conceded that Hindus in Bengal have a strong prejudice against keeping the body in the house after death If a person dies during the night, custom requires that the body should be taken out for cremation before dawn

This custom is not strictly observed in Darjeeling where the cremation ground is situated at some distance down the hillside, and where the necessary assistance is not so readily forthcoming late at night as it would be in the plains But even in Darjeeling it is highly probable that the body of a man who had died as early as 7-30 or 8 P M would be taken to the cremation ground that same night

The plaintiff's case is that Ramendra Narayan Roy was taken for dead shortly after 7 P M and that his body was taken out from "Step Aside" that same night at about 9 P M The defendants on the other hand assert that death did not take place until about midnight and that consequently the body was not taken to the burning ghat until the following morning

The plaintiff's case is bound up with the story of an evening cremation procession and a rescue by sannyasis during the night Consequently, the time at which Ramendra Narayan was taken for dead has assumed the greatest importance, and since there is a certain amount of contemporaneous documentary evidence inconsistent with the plaintiff's case as to the time of death, it became incumbent on the plaintiff to shew that the evidence was unreliable For this purpose, the plaintiff has contended that there was a conspiracy to murder him, and that the conspirators sent false telegrams in order to lull the fears of relatives and to prevent interference, and then procured false certificates and letters containing false statements, in order to cover all traces of their crime

A discussion as to the cause of death is, therefore, necessary to determine whether there was in fact a conspiracy to murder Ramendra Narayan Roy, and also to determine, if possible, the time at which he was taken for dead

The direct evidence on the subject is almost wholly one-sided The only person to give direct evidence on the plaintiff's side regarding the course of the illness prior to the time of apparent death is the plaintiff himself Other witnesses have been examined to prove statements made by members of the Darjeeling party after their return to Jaidebpur, and medical witnesses have been examined regarding the symptoms exhibited by Ramendra Narayan Roy and regarding the medical treatment prescribed for him

On the other hand, the defendants in addition to examining two of the doctors who were admittedly in attendance on the patient, have examined a number of members of the household and friends to prove what were the symptoms and what was the time of death

PLAINTIFF'S OWN ACCOUNT OF HIS ILLNESS

The plaintiff's evidence as to his illness as given in court is as follows

"At Darjeeling I was keeping well Then I got ill I got ill 14 or 15 days after my arrival at Darjeeling It commenced by my having flatulence at night (পেট ফাঁপা ছিল) It was towards the end of the night I spoke to Ashu Doctor then about it that night In the morning he brought a European Doctor He prescribed a medicine I took it that day Next day also I took it, it did me no good Then at night—(when read over, adds, "at 8 or 9 P M P B 22-12-33)—Ashu Doctor gave a medicine He gave it in a glass (shows a small glass) It did me no good As I took it, my "chest" (বুক) burned and I vomitted and I grew restless These symptoms appeared 3 or 4 hours after I took the medicine And I began to scream (চিকুর পাড়তে লাগলাম) No doctor came that night

Next morning I passed blood stools—the motions were in quick succession My body got feebler Then I got unconscious I do not know whether any doctor came to me till that moment"

* * * * * *

"About poison I don't know"

* * * * * *

"I heard the name of Calvert from Ashu Doctor at Darjeeling This I heard one day before I became unconsciousness (sic) I heard it say to-day The next day I was not unconsciousness (sic) Next day I was not so, but at night Ashu Doctor gave me medicine and I felt the burning sensation in the chest 3 or 4 hours after and said 'Ashu, what have you given me?' Next day I had blood stools and after that I became unconscious When I got the burning sensation I felt vomiting tendency and I screamed and I said 'Ashu, what have you given me?' Next day, as I said, I had blood stools"

* * * * * *

DIFFERENT VERSION GIVEN TO LINDSAY

This is the story given by the plaintiff in court, but it is by no means the only account that he has given since his arrival in Dacca in 1921 For some weeks after his arrival, he seems to have been singularly reticent regarding the incidents which took place at Darjeeling Even those relatives of Ramendra Narayan Roy who accepted him from the beginning omitted to question him regarding the past, and outsiders were equally considerate There is in fact nothing on record to shew that he said anything about his illness and rescue at Darjeeling, before his visit to J H Lindsay on the 29th May, 1921

J H Lindsay was then Magistrate and Collector of the district of Dacca In virtue of his office as Collector he was in charge of all Court of Wards' Estates in the district He was therefore directly interested in the affairs of the Bhowal Raj Estate, and in the claim put forward on behalf of the plaintiff

LINDSAY'S MEMORANDUM

On the 29th May, 1921, the plaintiff made a call on J H Lindsay at Dacca It is now admitted that this call was unexpected by Lindsay and was not made in response to any invitation issued by him The plaintiff was accompanied by three friends two of whom were practising pleaders of the Dacca Bar We have to rely on Lindsay for any evidence as to what took place at this meeting Lindsay made a note of the conversation shortly after it occurred That note reads

"The sadhu came to-day about 11 A M with Babu Sarat Ch Chakrabartti, Babu Pearı Lal Ghosh (?) and I think the Kashimpur Manager He said he want (sic) some arrangement made about his estate so that the tenants could be benefited I explained that the Board of Revenue must hold him not to be the second Kumar as they have carried on the work of the estate on that assumption for many years I said he could prove his identity in court in a suit or if he preferred to produce his evidence before me I was willing to record it He agreed to the latter procedure and the pleaders said they would file a petition to-morrow for such an enquiry They asked that the Board might pay the expenses and I replied that if they put in a petition to that effect I would get orders on it

"In reply to my questions the sadhu (second Kumar) told me that he had been ill for 2—4 days of pneumonia before he lost consciousness in Darjeeling He could not remember the name of the house in Darjeeling where he lived, he went from Jaidebpur to Darjeeling, that he was not ill at Jaidebpur except for a boil just above his right knee which occurred within 10 days of his going, there was no special cause of this boil, he did not remember when he was in Calcutta before that, that he recovered his senses in the jungle in the hills in the presence of one sadhu who has since been his Guru, that the sadhu said he had been senseless for 3—4 days, that the sadhu told him that he had found him lying on the ground as if he had been thrown there and that his body was wet with rain as it had been raining before he found him, that the sadhu did not say whether he found him in the day or night

(Sd) J H LINDSAY,
29-5-1921 "

"The sadhu agreed that the rents should be collected as usual by the estate officers and the pleaders urged that the tenants would have less objection to paying if the receipt were given in Bibhabati's name leaving out that of her dead husband

(Sd) J H L,
29-5-1921 "

In his evidence on commission Lindsay stated that he was conversant with Hindi and Bengali, and that so far as he remembered he wrote out the above note at the time of the interview

When cross-examined, no question was put suggesting that Lindsay was not conversant with Hindi, and the only cross-examination regarding the contents of this note is as follows —

"*Q*—Did he say he suffered from diarrhoea at Darjeeling?

A—I don't know anything except (shown) "J H L 2" From this document I see I recorded "pneumonia" I have no recollection of doing so

Q—Can you swear you did not commit a mistake here?

A—No

Q—Why did you make this memorandum?

A—I am not sure I wanted to get the man's own statement of his case as early as possible I think that was the idea

Q—I put it to you the memorandum was not made at the time of the interview

A—I think it was It was certainly made the same day I think it was made in my office room at my house"

In re-examination to the question

"*Q* —In cross-examination it was suggested that in recording that the claimant told you that he had been ill of pneumonia you made a mistake Do you consider it at all probable that you made this mistake? (Obpected to)"

the witness answered

"*A* —No I think it probable that that was the correct name of the disease (Shown J H L 3) "

The plaintiff's positive evidence regarding this interview is extremely brief he says, "I met Mr Lindsay, Collector of Dacca I met him at his house I went with Peary Lal Ghosh, a resident of Dacca He was a pleader Sarat Chakravarty, another pleader, came with me Rajendra Babu, Zemindar of Srinagar, also came with me" At a later stage, however, he gave a categorical denial to all the statements ascribed to him in Lindsay's note he stated

"It is false that I told Mr Lindsay I had pneumonia at Darjeeling It is false that Mr Lindsay asked me the name of the house at Darjeeling, or that I forgot to give it It is false that I had told him I had an abscess (কঁাপি) It is false that Mr Lindsay asked me when I had gone to Calcutta last before going to Darjeeling or that I said I did not remember It is false that I told him that when I returned to consciousness only one sannyasi was present Mr Lindsay, during my interview with him recorded nothing He talked in Hindi I also replied in Hindi "

Of the plaintiff's three companions at that meeting, two, *viz* , the pleaders Peary Lal Ghosh and Sarat Chakravarty, died before the suit came on for hearing The third companion was summoned to depose as a witness for the plaintiff Later on, an order for his examination on commission was obtained by the plaintiff from the court, but no commission was taken out and the witness was never examined

Lindsay's evidence has been rejected by the learned trial judge on two grounds, *viz* , firstly, that there is nothing to show how great was Lindsay's knowledge of Hindi, and secondly, that it was unlikely that the plaintiff should use the word pneumonia or that Lindsay should know the Hindi equivalent As pointed out above, Lindsay deposed that he was conversant with Hindi, and he was not cross-examined on the point The plaintiff deposed that he conversed with Lindsay in Hindi, and he did not say that there was anything to suggest at the time that Lindsay could not converse easily with him If there was any doubt as to Lindsay's knowledge of Hindi, it is difficult to understand why the plaintiff did not talk Bengali, a language with which Lindsay must have been familiar

Our attention was drawn to a letter written by Lindsay on 28th August, 1921, to the Divisional Commissioner, in which Lindsay referred to the visit of Dharam Das Naga to Dacca In this letter Lindsay observed, "I think of going down to interview him when Quarry returns from tour on the chance of getting some story out of him that he will have to stick to Quarry knows that up-country language to perfection and will be able to talk to the man much better than I" We have been asked to draw the inference that Lindsay's knowledge of Hindi was very limited In my opinion this remark does not justify the court in holding that Lindsay was unable to carry on a conversation in Hindi with the plaintiff, or to understand all the plaintiff said

With regard to the use of the word "pneumonia", it must be remembered that English words like this are commonly used in India by all class A sannyasi

who was examined by the plaintiff to prove the rescue at Darjeeling, and who claims to have been the plaintiff's companion during many years of wandering, admitted that he knew the word, though he did not speak English The plaintiff does not state at any time that he was not familiar with the word The reasons given by the learned trial judge for rejecting Lindsay's evidence on this point, seem to be singularly unconvincing, and even more so is the argument that Lindsay himself was uncertain about the statement because he would not swear that he had not made a mistake

J H Lindsay was a responsible officer It is true that he had made up his mind before the interview took place that the plaintiff was an impostor, and that to this extent he was biassed But, in spite of this, I am unable to believe that he was capable of deliberately ascribing to the plaintiff statements which the latter had not made nor do I think it possible that he misunderstood *everything* that the plaintiff said I believe that Lindsay's note is a substantially accurate record of the interview and it follows from this that I believe that the plaintiff, in the first account he ever gave of his alleged experiences at Darjeeling, gave a version materially different from that given by him in the witness box

STILL OTHER VERSIONS

There have been other different versions given by the plaintiff from time to time Many of the persons who met the plaintiff after his arrival in Jaidebpur in 1921 noticed a curious impediment in his speech It has been variously described by the witnesses, but it seems to be merely a sort of hesitation, which does not amount to a stammer and some witnesses deposed that some of the words sound indistinct The plaintiff accounts for this impediment by the fact that he has a small cyst on the frenum under the tongue It seems clear that the plaintiff informed many people that the impediment in his speech and the cyst under his tongue were caused by the poison administered to him Thus in his memorial he stated that "your memorialist's voice was affected on account of defect in the tongue from arsenic poison at Darjeeling" Witnesses such as Satyadhenn Ghosal gathered from the plaintiff's own account that there was an injury to the tongue caused by the poison administered to him In view of this evidence, special significance attaches to the evidence of two ladies examined on commission on behalf of the plaintiff They are Ananta Kumari Devi and Mokshada Devi. They are both ladies of Jaidebpur, intimate with the family and ardent supporters of the plaintiff They deposed to the effect that on the return of the other members of the party from Darjeeling, Sarif Khan, one of the orderlies, revealed how Ramendra Narayan had been poisoned Their story deserves to be recorded in their own words

STORY OF CORROSIVE POISON

Ananta Kumari Devi's account runs

"I knew a man by the name of Sarif Khan I purchased land from him He used to come to my house very often He was the orderly in the Rajbari Sarif Khan returned from Darjeeling. Thereafter I did neither speak with him nor appear before him He had a talk with my husband, I overheard from a place outside their view. After his return from Darjeeling my husband had talks with Sarif Khan When Sarif Khan was having talks with my

husband, my maid-servant came to me and said, "Come and hear what Sarif Khan is saying" Thereupon I began to overhear them from behind the panel of a door

Q —What did he say? (Objected to)

A —My husband said, "Sarif, you went to Darjeeling with the "Mejo Khoka," what happened? Will you disclose the matter to me?" At this Sarif beating his head and breast began to say, "Babu, what shall I say? My heart breaks down to tell that" (He spoke in Hindi, then I could understand)

"A poison or something like that was administered to Mejo Karta, saliva began to ooze out of his mouth, just see it had fallen on my cloth, please look here, my cloth has been burnt, a blister has formed on my thigh by its falling upon it" saying this he showed a burnt place in the cloth and the blister I also saw that from a place outside their view (Objected to)"

Mokshada Sundari Devi's account is very similar, *viz* —

"Sarif Khan went to Darjeeling with the Kumar After his return from Darjeeling, Sarif Khan went to see Satyabhama Devi I was present there then Satyabhama Devi asked Sarif Khan while weeping "Where and how have you left the Khoka?" Sarif Khan while striking his head said, "Raja had said to me, let me and you go to Jaidebpur with your mother, without informing my brother-in-law" Then he said, "Satya Banerjee was present there, Ashu doctor administered the medicine to him, some portion of the medicine the second Kumar took and some portion he sputtered away, with the sputtering of the medicine the Kumar said 'What have you administered, what have you administered?' Some portion of that medicine fell on the Kumar's bed, and as Sarif Khan was in front of it some portion fell on the cloth he was wearing and on his garment" He showed his cloth and garment which seemed to bear marks of scorching at places"

These two ladies were examined on commission in the year 1931 It is obvious from the record that some time after that, new advisers were called in by the plaintiff The result appears in the examination of Jyotirmoyee Devi, Jitendra Chandra Mukherji and Satinath Banerjee regarding this incident They refer to the incident but do not say anything about the burns shewn by Sarif Khan, and they add that they regarded his account as highly coloured

It seems to me clear that the story was given out at one time that some corrosive poison was administered to Ramendra Narayan Roy at Darjeeling, and further, that these ladies Ananta Kumari Devi and Mokshada Sundari Devi were induced to give false evidence in support of the story In other words, another story different from that given in court, and different from the one given to J H Lindsay, has been given out by the plaintiff or his advisers

PLAINTIFF'S EVIDENCE WHOLLY UNRELIABLE

From this discussion it is clear that at least three different stories have been given out by the plaintiff regarding the illness and the cause of apparent death at Darjeeling This proves that the plaintiff himself is wholly unreliable as a witness, and it follows that the court is not justified in arriving at any conclusion as to the events at Darjeeling relying only on the plaintiff's testimony But the fact that the plaintiff is an unreliable witness is not proof that he was not poisoned, nor is it proof that there was no conspiracy

to poison him If the plaintiff can show from the defendant's evidence that there must have been a conspiracy or that he must have been poisoned with arsenic, he is quite at liberty to do so, and this, in fact, is what Mr Chatterjee has attempted to do on his behalf

DEFENDANTS' EVIDENCE IN CHRONOLOGICAL SEQUENCE

To appreciate this part of the discussion it is necessary to set out fully the material at the disposal of the court, from an examination of which an inference is to be drawn

With regard to the symptoms shewn by Ramendra Narayan Roy during the course of the illness and the events which led to his apparent death, we have the evidence of Dr Calvert, Civil Surgeon of Darjeeling, who was admittedly called in to see Ramendra Narayan Roy on the 6th of May, 1909, and who was admittedly present during part of the day on which death is said to have occurred We have also the oral evidence of Dr Ashutosh Das Gupta, the family physician of Ramendra Narayan Roy, who was a member of the Darjeeling party We have also the oral evidence of other members of the household and also of Jagat Mohini, the district nurse, who was called in to nurse the patient shortly before his apparent death

In addition to the above evidence, we have the telegrams sent from Darjeeling to Jaidebpur as the illness progressed, and also copies of the prescriptions drawn up by the attending physicians Added to these, are two letters written by Dr Calvert after the supposed death and also a certificate of death granted by him to enable the widow to claim from an Insurance Company the amount due under a policy in Ramendra Narayan Roy's name It seems to me desirable to set out this evidence in the order in which it came into existence, adding at present only such comments as will make the case of the parties clear

6TH MAY

It is now admitted that the first symptoms of trouble appeared in the small hours of the morning of the 6th of May—a time which would be treated by Indians in general as part of the 5th of May

At some time in the morning of the 6th of May, Dr Calvert was called in He saw the patient and prescribed a carminative and some lint opii for external application The prescription is *Ex 51* in the case and is in these words

"Re

Spt Amon Aromat	℥iii
Sodi Bicarb	℥i
Tinct Card Co	℥vi
Spt Chloroform	℥iss
Aqua Cinamon	ad ℥vi

Mft mixt

℥i—one mark every 2 hours

Re

Lint opii ℥ii

For external application

Sd /- J T C"

On this day three telegrams were sent from Darjeeling to Jaidebpur The first signed by Mukunda Guin, the private secretary, runs

"Last night Kumar had fever below 99 no anxiety no fever now kindly with (sic) health

Sd /- Mukunda",

and was despatched at 10 A M The second was sent at 6-45 P M and was in these words

"Kumar attacked fever yesterday with severe stomach pain Civil Surgeon attending"

The sender of the telegram was a man named Cabral, who seems to have been a kind of upper servant As Cabral was illiterate, the message must have been written by some one else The third telegram was sent by Mukunda Guin at 8-55 P M and reads

"Fever abdominal pain lasted two hours now remission no anxiety no fear of recurring

Mukunda"

We have another piece of evidence which appears to refer to this day It appears that for reasons which will be discussed later, Satyendranath Banerjee began to keep a diary from about the 22nd or 23rd of May, 1909 He made entries under several dates earlier than the date on which he actually commenced to write The first such entry is under the head May the 7th and reads

"Ramendra's illness continues, pain in stomach with slight fever No sleep last night Wired home for fruits, etc"

This was not written on the day to which it refers, nor on the following day, but it was written about a fortnight later It may easily be that there is a mistake in the entry as to the date when a sleepless night was passed, as this entry does not agree with the telegram sent on the 7th nor with the oral evidence in the case

No wire asking for fruits, etc, is forthcoming

It is difficult to explain this entry other than as a mistaken one Though the statements in it are seen to be incorrect, it is difficult to imagine any sinister reason for deliberately making incorrect entries I am, therefore, of opinion that this entry cannot be relied on as a safe guide to Ramendra Narayan's condition

7TH MAY

With regard to the events of the 7th May there is much controversy There is no prescription by Dr Calvert for that date, and consequently there is no documentary evidence to shew whether he visited the patient on that day The oral evidence is contradictory, but most of the witnesses who depose on the point assert that Dr Calvert did come Their evidence as to the

time of his visit is very conflicting The only telegram sent on that day was despatched at 7-10 A M and was signed by Mukunda Guin It stated that the "Kumar had good sleep last night no fever no pain"

On this date, Dr Ashutosh Das Gupta, the family physician, made the prescription round which the whole controversy has raged

The prescription is *Ex 51 (a)* and is as follows

Re—

Quinine Sulph	Gr iv
Alom	Gr ½
Ext Nux vomica	Gr ⅓
Euonymin	Gr 1
Acid Arsinor (Arsenius)	Gr 1/100
Ext Gent	Grs

Impt Pill (silver) 1 T D S P C

Sd /- A T Das Gupta

On this day occurred an incident which seems to me very significant Hitherto Ramendra Narayan Roy had been sleeping in his own bedroom which was the third room from the south, on the first floor of the house On this day, a bed was made up for him on the floor of an adjacent room, and from then until he was carried out for cremation, he slept in this room There is some confusion as to the time when this change of rooms was made At first Satyendranath Banerjee said that it was made in the day time, but when he was cross-examined on the point, he stated that the change was made because Ramendra Narayan Roy had been rolling in agony in his bed and his usual bed was too narrow On further cross-examination, he admitted that Ramendra Narayan did not roll about in agony on the 7th at least before evening, and he stated that even then Ramendra was not exactly rolling in agony, but he was restless and in pain From this it is argued that the change of rooms must have been effected after dusk

This argument receives some confirmation from the evidence of Shyamadas Banerjee, who said that the room was changed 'perhaps on the previous day', and added that he saw Ramendra Narayan in the second room for the first time on the morning of the day of death The witness is very vague on the subject, and I am not convinced that he has any clear recollection as to the time of change However, it seems to be the common case of the parties that the change of rooms was made on the 7th of May, either in the day time or after dusk

8TH MAY

On the 8th of May we have three telegrams from Darjeeling to Jaidebpur and one from Ranendra Narayan Roy at Jaidebpur to Darjeeling There are four prescriptions for this day, two by Dr Calvert and two by Dr Nibaran Chandra Sen, who was the medical officer in charge of the Darjeeling hospital and who had been called in with Dr Calvert The first telegram of the day was despatched at 7-20 A M and is in these words

"Had fever slight pain yesterday now normal no anxiety

Ashutosh"

The sender was apparently Dr Ashutosh Das Gupta, the family physician

The first prescription for the day is *Ex 51 (c)* and bears Dr Calvert's initials It is as follows

"Re—

Mag carb	
Sodi bicarb	
Bismuth Carb	
Pulv Tragacanth Co	aa ʒi
Oil cajuputi	m xii
Aqua menth pip	ad ℥vi
T D S	

Sd /- J T C"

The plaintiff's case is that Dr Calvert made this prescription without seeing the patient, and on receipt of the report of some messenger from the house The defendants on the other hand assert that Dr Calvert saw the patient on the morning of the 8th May before making this prescription

A second telegram was sent to Jaidebpur at 11-15 A M to this effect, viz,

"From—Darjeeling

To—Hon'ble Kumar, Jaidebpur, ℞ B

Date 8th May, 1909

Time—11-15 A M

No fever slight pains vomiting tendency Civil Surgeon attending no anxiety coming giving rice wire 1,000 passage

Sd /- Mukunda"

Thereafter follow three prescriptions, *viz*,

Ex 51 (b)

"Re—

Sodi Citrate	ʒi
Aqua Sterilised	ad ʒvi

ʒi with milk as directed

Re—

Glycerine pepsin	ʒii

As directed

Re—

Pep Powder fresh

Re—

Atropia Tab	Gr 1/100
Strych Tab	Gr 1/30
Digitalin Tab	Gr 1/100
Ether pure	½ oz
Morphia Tab	Gr 1/8

Sd /- N C Sen"

The latter part of this is not a prescription, but is an order for a number o different drugs—which apparently were to be kept ready for an emergency

Ex 51 (c)

"Re—

Spt Ether		℥iv
Spt Amon Aromat		℥iv
Aqua Camphor	ad	℥viii

½ for a dose

Sd /- J T C

Re—

Ext opii
Belladonna
Saponis ad Gr ½

Impt Pill send 6 such 1 T D S

Sd /- J T C"

And *Ex 51 (d)*

"Re—

Lint Saponis
Sinapis Co ad ℥ii
To rub all over the limbs with ginger powder

Re—

Lint Chloroform—
Belladonna ad ℥ii
To be applied over the stomach

Re—

Spongis Lelini 12"×12"

Sd /- N C Sen"

The times at which these prescriptions were made is disputed It is the common case of the parties that at some time on the morning of May the 8th Ramendra Narayan Roy had a number of liquid motions in which there was fresh red blood The plaintiff's case is that these motions occurred in the

early morning before Dr Calvert's visit, and his further case is that the earlier liquid motions were not shewn to Dr Calvert, but that only the later motions, consisting of blood-stained mucus, were shewn

The defendants maintain that these motions first occurred at about 12 noon after Dr Calvert's first visit, that all but the first one or two motions were kept for Dr Calvert's inspection, and that the secretary, Mukunda Guin, was sent out in haste to recall Dr Calvert shortly after these motions first occurred The defendants allege that Mukunda Guin followed Dr Calvert from place to place until at last he found him and brought him to "Step Aside" at about 2 P M

A telegram was sent to Jaidebpur at 3-10 P M which reads

"Kumar is seriously ill frequent watery motions with blood come sharp

Mukunda."

After the arrival of Dr Calvert and Dr Nibaran Sen, two nurses were brought from the hospital to nurse Ramendra Narayan Roy They seem to have arrived at "Step Aside" after 4 P M In spite of the medical attention and care Ramendra's body became colder until at last he collapsed and (apparently) died The time of his apparent death is disputed, and there is also a dispute whether any injection of morphia was given to him that day

At 4-45 P M that day a telegram was despatched from Jaidebpur over the signature of Ramendra's elder brother It was to this effect—

"To

Kumar Ramendra

Very anxious wire condition, very often treat with best medical help wire immediately present condition

From—Ranendra

8-5-09 "

I do not propose to refer at this stage to the evidence of those witnesses who deposed that they heard of the death, of Ramendra Narayan at 8 or 9 P M, nor to the evidence of witnesses who stated that they accompanied the body to the burning ghat that evening Their evidence will be discussed when I consider the question of time of death and the story of the alleged attempt to cremate the body during the night Their evidence throws no light on the problems of the cause of death and the existence of a conspiracy to commit murder For the same reason I shall not discuss here the visit of Dr B B Sarkar

9TH MAY

On the morning of the 9th of May a body was admittedly taken from "Step Aside" to the cremation ground and burned to ashes Before the procession started, a doctor, who was living close by, was called in His name is Pran Krishna Acharyya I shall have to examine his evidence in some detail when considering the story of the morning cremation, but I shall anticipate the result of that examination, by saying that he was called to

"Step Aside" on the morning of the 9th of May by somebody who has not deposed in the suit What message was given to Dr Achaiyya is uncertain, but Dr Acharyya was under the impression that his professional services were required Dr Acharyya approached the body to examine it, when some one standing near objected on the ground that Dr Acharyya being a Brahmo might not touch the dead body of a Brahmin Dr Acharyya was naturally annoyed, and he turned on his heel and left the place The defendants do not dispute Dr Acharyya's visit, though none of the witnesses for the defence have retained any recollection of it The plaintiff has argued that Dr Acharyya was called in either to give a certificate of death or in the hope that he would certify without examining it, that the body was that of Ramendra Narayan Roy

10TH MAY

On May the 10th, the Darjeeling party made preparations for their return to Jaidebpur If we can trust the entry in Dr B B Sarkar's diary, Mukunda Guin went round paying the doctors On the same morning, somebody approached Dr Calvert and persuaded him to write the following letter of condolence to Ranendra Narayan Roy —

"1, Monteagle Villa,
Darjeeling,
10th May, 1909

"My Dear Kumar,

Please accept my most sincere condolence in the great loss which you have sustained through the death of your kind-hearted and amiable brother I am afraid that this sudden death must be attributed to a little over-confidence on his part regarding the nature of his illness and its probable termination The morning I was called in he felt so much better that he declined the treatment I proposed, even the earnest solicitation and exhortation of his private secretary and friends who were most solicitous concerning his condition failed to move him Later in the day he had a relapse, the colic coming on in a most intense form His Secretary with praiseworthy zeal himself went round the station until he had found me on my rounds and secured my early attention to the case This time he listened to the advice of the Secretary and his friends and allowed me to adopt the right treatment The colic quickly ceased under hypodermic medication, but unfortunately the system had received such a shock in the interval that he sank and died from collapse in spite of all our endeavours All that was possible was done to save your brother's life and he received the greatest care and attention from those about him It would have been a great boon if he could have had his friends around him, but the exacerbation of his illness came on so suddenly and terminated so quickly that it was not possible He had had milder attacks of this nature before, and it was his recovery from these which prevented him realising the serious nature of the last one before it was too late

Yours sincerely,
J T Calvert"

CREMATION AND DEATH CERTIFICATES

In July of that year steps were taken to obtain certificates of death and cremation to enable the persons interested to obtain from the Insurance Company the money due on a policy under which Ramendra's life had been insured Among other certificates is one from Dr Calvert, dated the 7th of July, 1909 That certificate reads as follows

"Certificate A
Policy No 74789
Life—Kumar Ramendra Narayan Roy
Claimant—Rani Bibhabati Devi

CITY OF GLASGOW LIFE ASSURANCE COMPANY

Certificate of Death

To be granted by the Medical Practitioner who attended deceased in his last illness

I, John Telfer Calvert, Lt -Col , I M S , Civil Surgeon, Darjeeling, do hereby solemnly declare, that I have known Kumar Ramendra Narayan Roy for 14 days and have been his consulting Medical Attendant for 14 days, that I attended him in his last illness, that he died aged about twenty-seven years at Darjeeling at 11-45 o'clock P M on the 8th day of May, 1909, after an illness of 3 days, that the cause of his death was collapse following upon an acute attack of biliary colic (gall stone)

The above was inferred from symptoms and appearances during life, that the symptoms of the disease which caused death were first observed by me on May 6th, 1909, and that the attack became acute on the morning of the 8th and he died the same evening

Signature—J T CALVERT
Designation—Lt -Col , I M S , Civil Surgeon
Place—Darjeeling

Declared before me this seventh day of July, 1909 Signature—W M Crawford, Justice of the Peace and District Magistrate, Darjeeling

N B—This Certificate must be countersigned by a Justice of the Peace, Magistrate, Collector or Judge of the place or district where the death took place, and must bear the Court's Seal when signed before any of the three last officials"

CALVERT'S LETTER TO LINDSAY

There is another letter of Dr Calvert which throws some light on this problem After the appearance of the plaintiff in 1921, J H Lindsay

wrote a letter to Dr Calvert, the contents of which are not known In reply to that letter Dr Calvert wrote as follows —

"Confidential

Dear Sir,

I remember the second Kumar of Bhowal who came on a visit to Darjeeling in May, 1909 He was suffering from "Gallstone" His death made a considerable impression upon me at the time, as I thought that had he only listened to our advice, he need not have died On the day of his death he was seized with a severe attack of biliary colic An injection of morphia would have relieved him almost immediately of his pain He refused to have any subcutaneous injections, because his mother when *in extremis* had died after receiving a hypodermic injection, and he attributed her death to the injection, instead of to the illness which necessitated the treatment Owing to vomiting and purging, opium by mouth and rectum was not retained The severe pain being unrelieved, brought on collapse from which he died I cannot now be certain whether I was present at the moment of his death, but I saw him shortly before it in a state of profound collapse On my last visit his Bengalee medical practitioner was present and arrangements made for the late Colonel Macrae, I M S, then I G C H, Bengal, to see him in consultation in the morning Col Macrae had been Civil Surgeon at Dacca and knew the Kumar's family The Kumar, however, did not recover from the collapse and died the same night

Yours sincerely,
J T CALVERT"

In addition to the above evidence we have the depositions of a number of witnesses examined by the defence and also the depositions of a number of medical men examined as expert witnesses

DISCREPANCIES IN DEFENDANTS' ORAL EVIDENCE

The oral evidence of the witnesses establishes that Ramendra Narayan Roy had numerous liquid motions on the 8th of May and that there was fresh red blood in those motions With the exception of Dr Ashutosh Das Gupta nobody deposed that there was profuse bleeding Even Dr Das Gupta sought to modify a previous statement to the effect that there was profuse bleeding, but later the same witness added that if he were now faced with a similar situation, he would have taken steps to stop the bleeding

Another defence witness Birendra Chandra Banerjee had deposed in the Sripur case that "in the first stools, blood of the quantity of half a commode pot came out", but in this court he explained that the deposition in the former case did not convey his meaning correctly

The remaining witnesses, including Dr Calvert, admit the presence of red blood in the stools, but not in very great quantities Dr Calvert stated that the amount of blood was negligible and that there was in his opinion no occasion to take any steps to stop the bleeding, beyond treating the disease which had occasioned the haemorrhage

It is apparent from a perusal of the evidence of Dr Ashutosh Das Gupta that this witness is wholly unreliable No matter what definite statement he made, he was compelled under stress of cross-examination to change it, and it seems to me that the learned counsel for the plaintiff was able to make the witness say anything that the learned counsel wanted I am not satisfied that the final statements of Dr Ashutosh Das Gupta are any more reliable than his earlier statements, but I shall examine those statements to see to what extent they tend to confirm the plaintiff's story

Another main discrepancy in the evidence regarding the symptoms is as to the time when Ramendra Narayan commenced to pass the liquid stools with blood Almost all the witnesses assert that this occurred about midday Dr Ashutosh Das Gupta in his previous deposition had said that these stools were passed about 8 A M He tried to resile from that statement, but ultimately reaffirmed it

The learned counsel for the plaintiff has argued that Dr Calvert's evidence also shows that the bloody motions must have occurred early in the morning In his cross-examination Dr Calvert deposed

> "The late Kumar never passed watery stools with blood, and had he done so, the treatment would have been adapted, if possible, to the cause of that condition The Kumar passed motions consisting of blood-stained mucus with a little free blood
>
> *Q* —When?
>
> *A* —On the day he died In the morning or in the middle of the day
>
> *Q* —Did he pass many such stools?
>
> *A* —I was told about a dozen They were kept most of them for my observation and I saw them The blood was fresh and red in colour I can't say when I first saw that *On the morning visit I think*"
>
> But in re-examination he deposed that so far as he could remember, "the severe symptoms must have occurred about midday, for I examined the stools by day light that I remember, and the patient instead of improving after that got worse"

It is clear that Dr Calvert had no clear recollection of the time except that it was during the day time Dr Ashutosh Das Gupta deposed in the Defamation case that Ramendra Narayan suffered from diarrhoea for two days before the death This is not the plaintiff's case, and it is contradicted by other defence witnesses such as Bibhabati Devi and Shyamadas Banerjee who both say that Ramendra was constipated until 8th of May It may safely be assumed that Dr Das Gupta's evidence on this point is wrong

TRUE METHOD OF TESTING SUCH EVIDENCE

The contradictory evidence regarding Ramendra Narayan Roy's condition at any particular time is a good illustration of the difficulty in dealing with this case None of the witnesses deposed until at least 12 years after the events they were describing, and some did not depose until 25 years after those events Before 1921 none of the witnesses had any occasion, so far as we can tell, to think about the details of Ramendra Narayan's illness; none of them kept any note regarding the patient's condition at any particular time In these circumstances it seems to me natural for the witnesses to

make mistakes and for them to contradict each other flatly I am of opinion that the most glaring contradictions are natural in such circumstances and that such contradictions do not justify an inference that any of the witnesses were giving deliberately false evidence The only way of testing such evidence is to consider the different versions given and decide whether any version tends to confirm the plaintiff's story, and also to decide which version fits in with the other facts to make a reasonably consistent story

CALVERT'S LETTER AND CERTIFICATE ON DIFFERENT FOOTING

This comment, however, cannot apply to Dr Calvert's letter of May the 10th, nor to his certificate of July the 7th, 1909 If these two documents are substantially accurate, they are sufficient to destroy the plaintiff's case For this reason a very determined attack has been made on Dr Calvert's credit It has been argued on behalf of the plaintiff that a persistent attempt was made by the defendants at one stage of the case to prove that Ramendra Narayan Roy's illness lasted for 14 days, and that Dr Calvert treated him throughout that period As it is now admitted on all sides that the fatal illness lasted for three days only, it is argued that all the witnesses who deposed to the 14 days' illness gave deliberately false evidence The learned counsel for the plaintiff contended that Dr Calvert in his evidence attempted to support the story of 14 days' illness and that in his death certificate, *Ex Z(III)*, the doctor had laid the foundation for this false case The learned trial judge accepted this argument, and even went so far as to state that the death certificate suggested a fourteen days' illness In my opinion there is no foundation for this argument at all

ATTACK ON CALVERT'S CREDIT

In the death certificate Dr Calvert clearly stated that Ramendra Narayan Roy died "after an illness of 3 days" and that the symptoms of the disease which caused death were first observed by him on May 6th, 1909

In this certificate, however, occurs a statement to the effect that the Doctor had known Ramendra Narayan Roy for 14 days and had been his consulting medical attendant for 14 days It was on this sentence apparently that the learned trial judge relied The defendants explained this statement by saying that when Ramendra Narayan Roy first arrived at Darjeeling, Dr Calvert was called in as a consulting physician Some of the witnesses even go so far as to say that Dr Calvert prescribed for Ramendra Narayan at that stage, but no prescription is forthcoming and the evidence is not very convincing The learned trial judge has placed great reliance on the fact that no prescription earlier than of the 6th of May is forthcoming In my opinion the absence of any earlier prescription proves nothing, and the admitted facts and circumstances are such as to suggest that the defence story in this respect is probably true

"FOURTEEN DAYS' ILLNESS"

It is admitted that Ramendra Narayan Roy was suffering from syphilis when he started for Darjeeling It is admitted in the plaint that Ramendra went to Darjeeling for a change of air From the description of Ramendra's character and personality as given by the plaintiff's witnesses, it is difficult to believe that such a man would go to Darjeeling for reasons other than

those of health In Jaidebpur, the Kumars of Bhowal retained the Civil Surgeon of Dacca as a consulting physician, even though they kept private doctors at the family mansion When Ramendra Narayan Roy went to Darjeeling, he took a large retinue, and his followers appear to have behaved as though Ramendra was an independent Prince In such circumstances, I see nothing strange in the story that Dr Calvert was called in as a consultant within a day or two of their arrival, and nothing strange in the absence of any prescription

On the other hand, I cannot understand why Dr Calvert should make such a statement in his certificate if it were not true At the time when the certificate was granted, there was no thought that Ramendra Narayan Roy might still be alive and no possible object could be served by inserting a perfectly gratuitous falsehood into the certificate

The plaintiff's counsel has sought to prove from Dr Calvert's own evidence that the Doctor was trying to make out a false case of 14 days' illness In the course of the cross-examination of Dr Calvert the following question was put, *viz*,

> "*Q*—Were you told in that statement that you assisted by Nibaran Chandra Sen and the family physician treated the Kumar during his last illness for 14 days? (Mr Pringle objects) "

to which Dr Calvert answered—

> "*A*—I don't remember I knew the fact without any statement "

And later occurred the following questions and answers

> "*Q*—Did you prescribe any medicine for the pain in the right side of the abdomen when you saw the Kumar first?
>
> *A*—I wish to protest against questions on immaterial matters, which, in my opinion, after I have stated clearly the facts I know I remember, may lead me, or confuse me, to think that I remember these small details after so long a lapse of time
>
> (In answer to the question which was repeated, Col Calvert says)—I do not remember but most certainly I must have done so
>
> *Q*—In what form?
>
> *A*—*I treated the condition from day to day*, and I can't remember now what I gave him "

Reliance has been placed on these answers to shew that Dr Calvert was supporting the story of 14 days' illness In my opinion the evidence taken as a whole does not warrant any such inference Dr Calvert insists again and again that he has no recollection of the day to day progress of the case Thus at one stage of his cross-examination he observed

> "I can't remember which was the first day I was a consultant called in as required "

And again,

> "I have told you I can't remember which was the first day or what medicine I gave him on that occasion "

And again,

> "The cause I saw was the stone in the cystic duct I can't remember whether I diagnosed it on my first visit as I can't remember when I first saw him "

I regard the first answer, on which the learned trial judge relied, as a hasty answer given by the witness to the first half of the question without considering carefully what the full question meant, and the statement that he treated the condition from day to day was a general answer not intended to convey any idea as to the number of days on which Dr Calvert treated the patient I can find nothing in the evidence of Dr Calvert to suggest that he was trying to make out a case of 14 days' illness But even if it be conceded for the sake of argument that Dr Calvert's evidence given on commission is unreliable, that seems to me no reason to ignore his letter of May the 10th Dr Calvert's recollection in 1931 might be faulty, but he could not have forgotten the principal events in the illness by the 10th of May, 1909

NO EXPLAINING AWAY OF CONDOLENCE LETTER

Our attention has been drawn to the language of this letter of condolence, and it has been argued that the language is not the language of an Englishman, and further that the letter must have been procured from Dr Calvert by Satyendranath Banerjee as a shield against awkward enquiries

The letter is in Dr Calvert's own handwriting Dr Calvert admits that he did not write the letter of his own initiative, but adds that he cannot remember who asked him to write it From these facts we have been invited to draw the inference that it was Satyendranath Banerjee who persuaded Dr Calvert to write the letter It may be noted that the learned trial judge has drawn this inference

In my opinion no such inference can be justified from the facts proved in the case Satyendranath Banerjee and Dr Ashutosh Das Gupta both deny having approached Dr Calvert for the letter and both deny knowledge as to how the letter was obtained Even if it be assumed that these two witnesses are untruthful, that fact alone is not sufficient proof of the existence of facts denied by them In my opinion there is material on the record indicating that Mukunda Guin was probably the man who induced Dr Calvert to write the letter In the first place, Satyendranath Banerjee was no longer dependent on the good graces of the elder brother Ranendra Kumar Roy and had consequently little reason to seek to satisfy the latter that he had been assiduous in his care of Ramendra Mukunda Guin on the other hand had recently been appointed Secretary to Ramendra and might easily be anxious lest the brothers of Ramendra should think that he had been negligent In the second place, the letter itself refers again and again in flattering terms to the conduct of Mukunda Guin, thus suggesting in my opinion the probability that it was the latter who had approached Dr Calvert Lastly, we have the entry in Dr B B Sarkar's diary that it was Mukunda Guin who went round paying the doctors All this evidence suggests that it was probably Mukunda Guin who obtained the letter from Dr Calvert There is no evidence whatever to shew that Satyendranath Banerjee or Dr Ashutosh Das Gupta obtained the letter, and both these witnesses deny having done so Mukunda Guin was unfortunately murdered in 1921, and his evidence on the point is, therefore, not available

In the circumstances I consider any inference that the letter was obtained by Satyendranath Banerjee or Dr Ashutosh Das Gupta to be wholly unjustified

We were asked to consider the evidence regarding the circumstances under which this letter was produced by Satyendranath Banerjee in 1921 and

to draw the inference that the letter must have been all along in his possession The evidence is far from clear and does not, in my opinion, justify any such inference

As to the argument regarding the phraseology of the letter being un-English, I cannot understand what inference we are asked to draw If it were argued that the letter was not written by Dr Calvert or that his signature had been obtained by fraud to a letter, of the contents of which he was ignorant, I could understand the argument But in this case the letter is in the handwriting of Dr Calvert himself and was written when the facts to which it refers, must have been fresh in his memory It follows that Dr Calvert must have been well aware both of what he was doing, and whether the statements contained in the letter were true or false The conclusion I draw is that the statements contained in that letter must be either substantially true or intentionally false

THE ARSENIC PRESCRIPTION

Before dealing with the expert medical evidence regarding the symptoms shewn by Ramendra Narayan Roy during his illness in Darjeeling and the prescriptions and general treatment, I propose to examine the much debated prescription *Ex 51 (a)* made by Dr Ashutosh Das Gupta on the 7th of May This prescription bears the initials of Dr Das Gupta and is disowned by Dr Calvert The evidence of the other doctors in the case shows that the medicine was so unsuitable in the circumstances that it seems scarcely credible that doctors of the standing of Dr Calvert and Dr Nibaran Sen could have prescribed it Dr Ashutosh Das Gupta at first denied that he had made the prescription and tried to say that he must have written it at the dictation of some one else, but he was ultimately driven to say that he must have made the prescription and administered the medicine

Two questions arise in considering this prescription, *viz*

1 Could it have been used with the intention of committing murder?

2 Was it intended not to administer the medicine but to use the prescription as a cloak to cover the administration of arsenic in some more deadly form?

THEORY OF INTENTION TO CAUSE DEATH

It is well known to laymen as well as to medical men that the symptoms of chronic arsenic poisoning resemble closely the symptoms of other diseases, such as, for example, enteritis A would-be poisoner might, therefore, obtain a prescription containing arsenic with the object of causing the death of his victim by giving repeated small doses of the poison We are not, however, concerned with a case of chronic arsenic poisoning, but with one of alleged acute arsenic poisoning caused by one single administration of the poison

The prescription *Ex 51 (a)* contains two poisons, *viz*, arsenic and strychnine It was to be made up into 25 pills each of which was to contain 1/100 gr of arsenic and 1/3 gr of Nux Vomica

According to medical authorities the minimum dose of arsenious oxide which is ordinarily fatal to human beings is less than 2 grains Some people are especially sensitive to arsenic poisoning, and much smaller doses have

caused death The learned trial judge relying on a misquotation in Dr Bradley's evidence states that death has been known to occur from the administration of two drops of Fowler's Solution, which is the equivalent of 1/48th grain of arsenious oxide Dr Bradley misread the authority in question The case is one described by Sajou in his Encyclopaedia of Medicine, but the facts are misstated Sajou states that after the administration of 2 drops of Fowler's solution, symptoms of arsenic poisoning occurred but passed away unrecognised at the time A further dose of 3 drops was then given to the patient The symptoms of arsenic poisoning were then so marked that proper treatment was given and the patient recovered This seems to indicate that 1/20th grain was not fatal in this case of extreme susceptibility

It is obvious, therefore, that 1/100th grain of arsenic could not be expected to produce any symptoms of arsenic poisoning, and even the whole 25 pills if reduced to powder and given at once would not cause death by arsenic poisoning to anybody unless that person was unusually susceptible I find it difficult to believe that any murderer would set out to poison his victim by giving him only 1/8th part of the dose which might ordinarily be expected to cause death One would expect a murderer in such a case to err on the other side and to give his victim an excessive dose This argument would apply with added force to the case of a poisoner who had the expert knowledge of a doctor

Another reason for holding that this medicine could never have been administered with the object of causing the death of the Kumar, is to be found in the amount of Nux Vomica in the prescription Nux Vomica contains strychnine Strychnine poisoning is accompanied by dramatic symptoms which cannot be ignored Moreover, the symptoms occur within a very short time of the administration of the poison No body could hope to administer strychnine to a victim in the presence of others, and in sufficient quantity to cause that victim's death, and yet escape detection In the present case it is conceded that Bibhabati Devi could not possibly have been a party to any conspiracy to murder her husband, but she must have known of the administration of any drug to him It follows, that no conspirator could have intended to cause the death of Ramendra Narayan Roy by strychnine poisoning Yet a quantity of the pills prescribed in *Ex 51* (a), sufficient to cause symptoms of arsenic poisoning in an ordinary human being, would be more likely to cause his death by strychnine poisoning

The prescription was made up into silver coated pills It is impossible to believe that any conspirator would attempt to administer 25 pills to his victim at one time On the other hand, the mixture is so nauseating that if the pills were pounded and administered in the form of a powder, it is almost certain that the powder would be vomited forth immediately

For these reasons, I am convinced that this medicine could never have been administered to Ramendra Narayan Roy with the intention that it should cause his death

POSSIBLE USE AS A CLOAK

I find it almost equally difficult to believe that this medicine was obtained as a cloak for the administration of arsenic in some more deadly form The difference between cases of poisoning by a single large dose and of poisoning by repeated small doses must be kept in mind A poisoner setting out to cause the death of his victim by administering a single large dose

of arsenic, must expect either to cause the death of his victim almost immediately, or to fail in his attempt When arsenic is administered in this way, the victim is almost certain to realise that he has been poisoned and to express his opinion to persons with whom he is in contact If, therefore, the victim comes into contact with persons who are not members of the conspiracy to poison him, he is almost certain to tell them of his suspicions If a doctor is called and sees the victim and hears of these suspicions, the probability is that the doctor will insist on a chemical examination of the faeces and vomited matter, to determine whether arsenic has been administered or not Such an examination might be expected to reveal arsenic in quantities for which the prescription *Ex 51 (a)* would not account In other words, if suspicion was aroused at the time, such a prescription would be useless as a cloak

If, on the other hand, no innocent outsider came in contact with the victim and heard his suspicions, death might be expected to occur quickly Among Brahmins and other caste Hindus in this country, it is the custom to cremate the dead body within a very short time of death There is no custom of keeping the body in the house for several days, nor is there any custom of burying the dead, nor is any medical certificate required before a body can be burned at the cremation ground Therefore, if a caste Hindu is poisoned and no suspicion is aroused at the time, it is almost certain that the body will be cremated and all evidence of poisoning destroyed In a case of this kind there is no necessity to have such a prescription as *Ex 51 (a)* as a cloak It seems to me, therefore, that in a case of acute arsenic poisoning such a cloak as a prescription like *Ex 51 (a)* containing a minute quantity of arsenic, is either so obviously unnecessary or so obviously useless that no murderer is likely to think of employing it

I do not believe, therefore, that these pills were administered with the deliberate intention of poisoning Ramendra Narayan Roy, nor do I believe that they were procured as a cloak to cover the administration of arsenic in some other form

The plaintiff's argument in favour of arsenic poisoning is based almost wholly on the evidence of the expert witnesses, more particularly on the evidence of Dr MacGilchrist and Dr Bradley

BILIARY COLIC—CAUSE AND TREATMENT

All the doctors examined in the case agree as to the cause of biliary colic, though there is a difference of opinion as to the appropriate treatment

Stones form in the gall bladder, which vary considerably in size If they are very small, they pass out with the bile and cause no great discomfort If, however, they are too big, they may stick in the cystic duct or in the common duct They are then either forced out through a duct which is too small to allow them free passage, or they recede into the gall bladder temporarily When the stones are being forced through the ducts, they cause the patient excruciating agony, which is known as biliary colic In some cases the stones may not be able to pass through the ducts at all, and they may cause ulceration in the ducts and surrounding tissues and escape through the ulcerations so caused

To quote Dr MacGilchrist, "Biliary Colic comes in paroxysms at intervals of 1 or 2 minutes or the second paroxysm may not come for days, or a single

paroxysm may expel the stone and the thing is finishing requiring no further treatment except as a precaution"

MEDICAL EVIDENCE

Treatment of biliary colic may be divided into 3 stages, *viz*

(i) treatment to prevent the formation of stones, or to dissolve them in the gall bladder,

(ii) treatment during the interval, other than treatment for the purpose described in (i), and

(iii) treatment during the paroxysm

Judging by the evidence recorded in this case, medical opinion is divided as to the treatment

For the interval between paroxysms Dr MacGilchrist would prescribe—

"Full diet, specially meat diet, which increases bile acids which have the power of dissolving gall stones to some extent

And next, warm weak solution of alkalies such as sodium bicarbonate or Vichy waters or Carlsbad waters

And thirdly, exercise, abdominal massage These have the same effect—increases circulation of the juices and secretions of the abdominal contents

And one must wear abdominal belts or tight clothes round the abdomen, and there are certain drugs that increase the secretion and flow of bile, such as sodium salicytate, and because of marked constipation that accompanies biliary colic, laxatives

These are the chief measures to prevent the formation of gall-stone and the best drug is olive oil—large doses, 2 to 4 ounces early morning in empty stomach daily I would give it, as oils are absorbed from the bowels as fatty acids and glycerine All fats break up into these two before they are absorbed and these have power of dissolving the chief constituents of gall-stones There is no drug which has a direct action or can reach a gall-stone in situ, but there is a probability of fatty acids doing so"

And for the paroxysms, he would advise hot applications, fomentations, hot baths, if the patient is equal to them, and hypodermic injection of morphia

Dr Bradley on the other hand deposes as follows

"*Q*—What would be your prescription in a case of impacted gallstone during attack?

A—The only thing you can do is to relieve the suffering of the patient

Q—What would you prescribe during intervals?

A—There is not much treatment again I would restrict or prohibit eggs in the diet, would give warm saline drinks, prescribe exercise and massage and advise the patient to go and see a surgeon In other words, the treatment is entirely surgical, not medical"

Dr Calvert clearly belongs to the school which believes that during paroxysms the only thing to do is to relieve the pain and that this end is most readily achieved by injecting morphia He does not believe in any treatment to prevent the formation of stones or to dissolve them in situ He states that in between the paroxysms, the patient is left with an irritable stomach and intestines during which gastric sedatives are recommended by the authorities Dr Calvert asserts that he was called in on the morning of May the 6th and that he treated the patient for dyspepsia, probably due to gall-stone Both Dr MacGilchrist and Dr Bradley agree that the prescription *Ex 51* is suitable for dyspepsia with flatulence Dr MacGilchrist, it is true, says that he would not prescribe it for a man suffering from biliary colic, but the context shews that he was then referring to the paroxysm and not to the interval He nowhere says that this would not be a suitable prescription for the interval, if the patient suffered from dyspepsia

Dr Bradley deposes that he would not prescribe *Ex 51* and *51 (c)* for the intervals in biliary colic unless by coincidence the patient had indigestion, and in cross-examination he accepted the following statement in Price as authoritative, *viz*, "In biliary colic most frequently the development of gall-stone is preceded and accompanied by continuous or intermittent dyspepsia "

It is true that he also states that he would not prescribe *Ex 51* and *51 (e)* for intervals in biliary colic, because they will treat the effect and not the cause

EFFECT OF EXPERT EVIDENCE

The total effect of this expert evidence seems to me to be this In the intervals of biliary colic, the patient will probably suffer from dyspepsia Prescriptions *Ex 51* and *51 (e)* are suitable for dyspepsia but would not reach the cause of the trouble, *viz*, the gall-stone Though Dr Bradley would not have given these prescriptions, it is by no means clear that Dr MacGilchrist would disapprove of them Dr Calvert's statement that he prescribed these medicines for dyspepsia caused by gallstones is, therefore, not an incredible or unreasonable statement Dr Calvert's disbelief in the efficacy of any treatment in the interval for the purpose of removing the stone, is shared by Dr Bradley, and therefore, the absence of any prescription indicating such treatment is no indication that the patient did not suffer from biliary colic

It is agreed on all sides that for the paroxysm the only treatment is to relieve the pain, preferably by injecting morphia Dr Calvert asserts that from the beginning he advised morphia injections but the patient obstinately refused to have them, because his mother had died after receiving a hypodermic injection and he attributed her death to the injection

Now it is not denied that Ramendra Narayan's mother Bilasmani Devi had died after receiving such an injection All the members of the Darjeeling party who have deposed in this case have sworn that hypodermic injections were recommended by Dr Calvert and refused by Ramendra Narayan Roy

Moreover, both in his letter dated May the 10th, 1909, and in his letter dated August 3rd, 1921, Dr Calvert clearly stated that Ramendra Narayan Roy refused to have an injection until too late I am unable to imagine any circumstances which could have induced Dr Calvert falsely to assert in the letter *Ex Z(205)* the story of refusal of hypodermic injections, nor

can I understand why he should have mentioned this detail in his letter of 1921, if it was not true The letter of 1921, *Ex Z(127)*, does not read like the letter of a man who has been instructed what to write, and even Mr Chatterjee for the plaintiff in dealing with this letter described it as the result of real memory

REFUSAL OF HYPODERMIC INJECTION

We are asked to reject the evidence regarding the refusal of hypodermic injection by the patient, because the witnesses give very conflicting evidence as to the time when it was recommended, and also very conflicting evidence as to the time when consent was ultimately obtained and the injection given I regard this conflict of evidence as natural Further, our attention was drawn to the phrase, "The morning I was called in he felt so much better that he declined the treatment I proposed" in *Ex Z(205)*, and Mr Chatterjee asked us to hold that Dr Calvert meant to say that he advised hypodermic injection during the interval between paroxysms Dr Calvert was not asked to explain the meaning of this phrase It does not seem to me necessarily to mean that he recommended an injection during an interval, nor can I believe that Dr Calvert would deliberately write what he considered nonsense in such a letter, whatever the inducement to write the letter might have been It must be remembered that when writing that letter Dr Calvert was not attempting to describe accurately and in detail the course of the illness he was writing a difficult letter to a person whom he had never seen I am of opinion that the very fact that this story of the mother dying after an injection remained in Dr Calvert's memory, is a strong indication that an injection was recommended and refused until too late

It should be noticed that in the first prescription *Ex 51*, there is included Linct opii, and in *Ex 51 (c)*, a later prescription of Dr Calvert's, there are opium and belladonna pills

Dr Calvert's description is to the effect that when injections were refused, he tried Linct opii and subsequently the opium and belladonna pills as substitutes We have been asked to hold that they could never have been prescribed as substitutes As to the efficacy of these alleged substitutes, Dr Bradley deposing in 1935, said

> "Linct opii on *Ex 51* is a liniment I would not prescribe it—but 20 or 25 years ago when I first began to practise, it was used for massaging, for rubbing into sore, painful areas and so forth, but experience has shewn it is of no use It is not absorbed",

and (*Ex 51 (c)* shewn)—

> "*Q*—Suppose the patient had refused hypodermic injection and he had pain, would it have been reasonable to prescribe this opium and belladonna as sedative?
>
> *A*—If he had refused hypodermic injection, then opium and belladonna pills would be a good sedative to give—logically it would be"

Dr Calvert was under no illusions as to the comparative superiority of injections, but in this case he said that it was not a case of what treatment was necessary for the patient, but what treatment he would accept and agree to at the hands of his medical attendants

I can find no adequate reason for rejecting Dr Calvert's evidence regarding the refusal of hypodermic injections by Ramendra Narayan Roy until too late, and regarding the prescription of substitutes for injection

I hold, therefore, that there is clear and reliable evidence on record that the treatment for paroxysms in biliary colic was prescribed in this case

But the prescription of Dr Ashutosh Das Gupta on May 7th, *viz Ex 51 (a)*, was not appropriate in a case of biliary colic All the doctors agree on this point If this prescription had been made by Dr Calvert, it would be difficult to believe that he had already diagnosed biliary colic But it was not prescribed by Dr Calvert It is true that Dr Ashutosh Das Gupta tried to suggest at one time that Dr Calvert must have prescribed this medicine, but he gave up the suggestion

Dr Ashutosh Das Gupta was not a fully qualified Bachelor of Medicine He had no qualifications which would be recognised outside India He had passed out of the Dacca Medical School, but was, at the time, young and inexperienced It is agreed by all the experts that on account of the marked constipation that usually accompanies biliary colic, laxatives are indicated for the intervals, and the evidence of the defence witnesses other than Dr Ashutosh Das Gupta, is to the effect that Ramendra Narayan Roy suffered from marked constipation at this time

It would have been natural for Dr Ashutosh Das Gupta to prescribe a laxative Instead he prescribed a drastic purgative This purgative would have been harmless at ordinary times 'Though it was in fact not suited to the occasion, I do not think that the administration of this medicine shews any criminal intention ' it is a medicine which an inexperienced and rather incompetent medical student might have thought to be suitable

"WATERY MOTIONS WITH BLOOD"—POSSIBLE EXPLANATION

Dr MacGilchrist and Bradley have deposed that frequent watery motions with blood do not occur in cases of biliary colic, and Dr Calvert agrees that they occur very rarely From this it is argued that Ramendra Narayan Roy could not have been suffering from biliary colic But this conclusion does not logically follow It may be that in cases of biliary colic where there has been no interference by an incompetent physician, watery stools with blood will not occur But the problem we have to solve is whether such symptoms would occur in a case of biliary colic if the patient had been given the medicine of prescription *Ex 51 (a)* This question was not put directly to any doctor The nearest approach to a direct question on this point was made to Dr Bradley In his deposition occur the following passages

> *"Q*—You have seen the prescriptions for indigestion and flatulence, and then you come across these two other prescriptions of his, one indicating severe diarrhoea and the other indicating collapse, and you also have seen the prescription for relieving cramps and also the liniment for application on the stomach, and you also have the information that Col Calvert found free fresh blood in the stools of the patient on the day of his collapse, putting all this together, how do you diagnose the case?
>
> *A*—My first impression would be cholera, but when I heard of the fresh blood I would rule that out and go back to the previous

question to which I said that something (must) have produced an intense congestion of the lower bowels

Q —Suppose when this occurs to you, you are told that behind Col Calvert's back the prescription *Ex 51 (a)* was made, would that help you to come to a diagnosis?

A —I would have settled it in my mind I would think that the patient had had an overdose of this (points to *Ex 51 (a)*)

Q —What would you call an overdose?

A —That would mean a long answer, because you must take the prescription as a whole and not any one of the ingredients You have half a grain of aloin, a grain of euonymin, one-third grain of nux vomica, these three things alone in the doses here, are capable of producing purging, specially in a patient with gastric irritation or indigestion Normally, I would not expect anything serious from the amount of arsenic here—1/100th of a grain Judging by what we know of the patient it might prove serious in combination with the other ingredients, but I would come to the conclusion that an overdose had been given by mistake, but I should say that this prescription as it stands, one pill three times a day, might itself prove serious under the circumstances as I visualise them, but I should imagine an overdose, when there were so many doctors and nurses, but I put in nurses as I read in Col Calvert's evidence that there was a nurse on that day and she does not appear again—I should imagine some interference with each other I should suspect an overdose—the case being muddled up in some way How can it be otherwise when on three days you have an amazing collection of prescriptions? It is constantly (? certainly) not the etiquette of our profession to administer a medicine to a patient behind the back of the consulting physician * * * *"

and—

"Q —Are you suggesting that Col Calvert did not treat the case properly?

A —I did suggest that in view of his statement that there was bright red blood in stools and the collapse and death of the patient I think that I should add in defence of Col Calvert that he failed to realise that there was any influence or factor in the case until it was too late He was too great a physician to make a careless mistake He was proceeding on the assumption that it was biliary colic until it was too late I don't want to criticise a man like Col Calvert Either he made a mistake or his memory was at fault"

This evidence does suggest that the symptoms which appeared on May the 8th might be expected to occur in a case of biliary colic, if, during an interval, the pills prescribed in *Ex 51 (a)* had been administered

The doctors have one and all stated that if there is bleeding in the upper intestine, this will pass out of the rectum as a tarry black substance—for,

as Dr Bradley says, "the intestinal tract is 36 feet long and some digestive processes must have taken place on the blood passing through that, however rapidly it might pass, and therefore it would get black"

In dealing with this point, too, it is not clear that doctors have taken into account the drastic purgative *Ex 51 (a)*

Be that as it may, Dr Bradley's evidence seems to me to shew that the symptoms of May the 8th could occur in a case of biliary colic, if the patient had taken the drastic purgative prescribed by Dr Ashutosh Das Gupta There is no evidence regarding the number of these pills taken by the patient But we do know that he was a self-willed obstinate young man, and he may easily have taken more than the prescribed number

The later prescriptions of May 8th are admittedly not prescriptions which may be expected in cases of biliary colic, nor are they the recognised treatment for acute arsenic poisoning They shew merely that steps were taken to deal with the symptoms already mentioned

SYMPTOMS OF ARSENIC POISONING

Mr Chatterjee for the plaintiff laid considerable stress on the evidence that the symptoms of May 8th are those that occur in cases of acute arsenic poisoning The authorities all agree that in cases of acute arsenic poisoning the symptoms may resemble those of cholera, but that in the former red blood may appear in the stools, whereas in the latter it will be absent In both cases, cramps and exhaustion may be expected to occur

But none of the doctors were asked whether these symptoms would be likely to occur at the times described by the plaintiff

In Lyon's Medical Jurisprudence the symptoms of acute arsenic poisoning are described thus

> *"Gastro-enteric type—*
>
> In this country, where practically all cases of arsenical poisoning are due to one or other of the three slightly, if at all soluble, natural compounds, *viz*, the oxide or the sulphides, symptoms do not appear till from half to one hour after the ingestion of the poison The oxide is usually more rapid in action than the sulphides The interval before the appearance of the symptoms may be very short if a large dose of the poison has been taken, or if the arsenical compound has been treated with a substance that increases its solubility, as is not infrequently done This practice will be referred to later
>
> The earliest effects following on the taking of the poison are a feeling of faintness, accompanied by nausea and heart-burn Shortly after this the individual begins to vomit, ejecting such food as his stomach may contain The heart-burn rapidly develops into a burning pain in the stomach, which extends upwards to the throat The pain increases in intensity, and spreads over the abdomen and thorax, the slightest pressure on the abdomen is resented It is at this stage that the medical man generally first sees the patient He will probably find the unfortunate tossing about on his charpoy or on the floor, vainly trying to find some position which will bring him relief from the agonizing pain, while at increasingly frequent intervals he reaches over the side of the bed to vomit, with explosive violence, quantities of slimy fluid, which may already be showing spots or streaks of blood

The throat feels raw and parched, the thirst is unquenchable The patient begs continually for water which he swallows greedily only to eject it almost instantaneously The tongue is coated with a thick white fur The vomit begins to be more mucoid in character, and is coloured yellow or green by regurgitated bile, and is probably now more heavily flecked or streaked with blood The abdomen is distended, and the torment is increased by the superaddition of colic Purging soon follows, at first of the ordinary bowel contents, later of fœtid, fæculent, and perhaps blood-stained matters An ominous sign is the appearance of thin, watery, turbid motions, resembling the well-known "rice-water" stools of cholera Tenesmus and pain of a burning character are constantly present in arsenical poisoning The patient at first has control over his sphincters, he will during the earlier stages retire to the closet, or will ask for the bed-pan, later with increasing exhaustion will come loss of control and involuntary evacuations The urine may be suppressed, or if any is passed, it is high coloured and albuminous, and possibly contains blood Micturition is difficult and painful Soon after the onset of purging the nervous symptoms become manifest Cramps occur particularly of the muscles of the calves Exhaustion from pain and the rapid draining away of the body fluids brings with it the usual signs of collapse, a feeble pulse, embarrassed respiration, and a subnormal temperature, accompanied by cold clammy sweat The face is pinched, the eyes sunken, the breath cold, the cyanosis of the lips tells a deficient aeration of the blood, which, thickened by the rapid draining away of the body fluids, can no longer be maintained in efficient circulation by the failing heart The patient gradually but steadily sinks, fluid evacuations dribble away from the now inert body, feeble attempts to vomit give place to a persistent hiccough The mind, at first unaffected, shares in the general exhaustion, a low delirium may supervene Respiratory and cardiac weakness become progressively more marked, twitching of the muscles, or even general convulsions, may usher in the end, which, however, in most cases takes place quietly from respiratory and cardiac failure, in from eighteen to twenty-four hours

The condition is as a rule steadily progressive from start to finish, the procession of the symptoms being continuous Remissions may, however, occur, followed by a return of the acute symptoms

Prognosis —Such is the sequence of events in a fatal case, but a fatal issue is, of course, not inevitable The severity of the early symptoms may subside, the vomit becomes less in quantity, the stools less copious, are now tinged with bile, the acute burning pain is dulled, and the urine is voided more freely The exhausted patient may fall asleep, to awaken, shaken by the storm he has weathered, with a still irritable stomach, which is unable to tolerate any but the blandest of foods, a tender abdomen, a sore throat, and a troublesome thirst Improvement is generally rapid, though in exceptional cases peripheral neuritis, with perhaps wasting of the muscles, and paralysis may supervene days after the subsidence of the acute condition

Recovery may even take place after the patient has entered the state of collapse, the pulse becomes stronger, the respiration improves, the body temperature rises to normal or even over, a stage of reaction sets in, but unlike the reactionary stage of cholera, this period is not fraught with danger

Signs presaging a fatal termination are the continuance of copious watery motions, fall of temperature, increasing cyanosis, and a failing pulse "

From this description, I should not expect the pain in the chest to occur 3 or 4 hours after the administration of the poison, nor should I expect the vomiting and purging to be delayed for 8 or 10 hours I can find no authority for the view that liquid motions would cease to occur 8 or 10 hours before death, though the patient continued to pass mucus stained with a little red blood In other words, though the symptoms found on May 8th may each of them occur in cases of arsenic poisoning, I am not satisfied that they would occur in the order and at the times alleged by the plaintiff

DR DENHAM WHITE'S OPINION—NOT HELPFUL

Mr Chatterjee laid great stress on the evidence of Dr Denham White who deposed for the defendants

Dr Denham White deposed that from Dr Calvert's evidence alone, without considering the prescriptions, he formed the opinion that the case was not of enteritis, but when he took the prescriptions into consideration, it was his opinion that the illness was dysentery but that the treatment was not for that In view of the fact that Dr Calvert insists that he does not remember with any degree of accuracy what was the course of the illness, and that speaking from memory, he gives the ordinary symptoms of biliary colic, with the single addition that the Kumar passed motions consisting of blood-stained mucus with a little free blood, it is difficult to understand on what material Dr Denham White formed these opinions His opinion and the opinions of the other experts in the case are much less helpful than they might have been owing to the manner in which they were examined These doctors may reasonably be regarded as experts in medical matters, but they are not necessarily experts in appraising the value of oral evidence They are competent to give expert opinion on a given set of facts, but they are not necessarily competent to determine from a mass of contradictory evidence what those particular facts are Therefore, their opinions as to the significance of the prescriptions made and of the symptoms that are known to have occurred are entitled to respect But any opinion expressed by them, based on a perusal of the oral evidence of a witness and without a clear statement of the facts which they consider to have been established, seems to me of little value For this reason I find it difficult to attach much importance to the evidence of Dr Denham White to which I have referred above

After careful consideration of all the medical evidence in the case, I do not think there is any good reason to doubt that Dr Calvert diagnosed biliary colic and treated Ramendra Narayan Roy accordingly, and that the symptoms which occurred on May the 8th were due in part to biliary colic, and possibly in part to the purgative *Ex 51 (a)*

Mr Chatterjee for the plaintiff drew our attention to the evidence of Satyendranath Banerjee regarding the change of bedroom after dusk on the evening of May the 7th and argued from this that Ramendra Narayan Roy must have been rolling about in agony in his bed on that night From this, we are asked to hold that the agony and rolling which induced the conspirators to move Ramendra from his bedroom to a bed on the floor of an adjoining

room must have been due to the arsenic poisoning If that were indeed the case, then the change must either have been made after mid-night if it is to fit in with the plaintiff's version, or have been made in anticipation of the agony to come With a fine disregard of his client's evidence, Mr Chatterjee also drew our attention to the evidence of Satyendranath Banerjee to the effect that the attendants went to bed that night at about 10 p m and slept peacefully till morning Mr Chatterjee treated us to a vigorous denunciation of the heartlessness of these scoundrels who paid no attention to the screams of agony of Ramendra Narayan Roy and left him unattended till morning We were then asked to consider the evidence of Dr Ashutosh Das Gupta and hold that a messenger was sent to Dr Calvert at 4 or 5 A M to report that the patient was much better and to obtain the prescription *Ex 51 (e)* I shall refer to these versions when discussing the theory of conspiracy

INCONSISTENT FINDINGS OF TRIAL JUDGE

The learned trial judge is rather inconsistent in his findings on this subject At one place in his judgment, he indicates that nobody suggested that if arsenic got into Ramendra Narayan's system on May 7th and led to the symptoms found on May the 8th, that arsenic must have come from the pills of the prescription *Ex 51 (a)* But later the learned judge observes "But so long the bare possibility that he (*i e*, Dr Ashutosh Das Gupta) gave this medicine like a quack and was frightened at the result, remains, I cannot find that he did it wilfully to cause death" The learned trial judge was not satisfied that there was a conspiracy to kill, nor even a deliberate attempt to murder Ramendra Narayan Roy yet at the same time the learned judge held that the telegrams sent during the course of the illness were deliberately false, that the watery stools with blood were deliberately hidden from Mr Calvert and thereby the latter was prevented from applying the proper treatment, and Dr Calvert was subsequently induced to write a letter full of falsehoods and to give a deliberately false certificate of death. I am unable to reconcile these findings The learned counsel for the plaintiff who based the whole of the rest of his argument on the findings of the judge, challenged this finding and argued that there must have been a conspiracy to kill.

ALLEGED CONSPIRACY TO MURDER

Let us, therefore, consider the possibility of there having been a deliberate conspiracy to murder Ramendra Narayan Roy, by administering arsenic poisoning In favour of the theory of deliberate arsenic poisoning we have the evidence of the plaintiff as to the administration of the poison I have shown above that I consider this evidence worthless We have further the symptoms of the 8th of May which are apparently consistent with a case of arsenic poisoning, though not, I think, inconsistent with the defence version

We have further the fact that biliary colic was not mentioned in the telegrams, nor in the obituary notice which appeared in the newspaper on May 11th, and if the letter of Satyabhama Debi in 1917 is considered conclusive, it was not believed by the family to be the cause of death

REFUTATION OF THEORY

Against this we have the considered opinion of Dr Calvert who was an extremely able physician, and who had the advantage of seeing the patient before the serious symptoms developed and who must have heard from the patient himself the symptoms which manifested themselves previously Dr Calvert's evidence is confirmed by his letters and his certificate, unless these are deliberately false, there was a proposal to inject morphia, which cannot be reconciled with the plaintiff's version It is also difficult to account for the change of bedroom in a way to fit in with the plaintiff's version It seems to me that unless Dr Calvert was knowingly writing false letters and giving a false certificate, the theory of conspiracy is untenable, and Dr Calvert had no reason to do so—unless of course he was bribed But the most convincing refutation of the theory is obtained by merely setting out the conduct of the conspirators step by step on the assumption that there was a conspiracy Thus, we are requested to believe that Satyendranath Banerjee, Dr. Ashutosh Das Gupta and Mukunda Gun conspired together to murder Ramendra Narayan Roy by administering a single fatal dose of arsenic They waited before putting their plan into effect, until Ramendra had some illness requiring the attendance of an outside physician of great reputation They then called in two doctors, viz Dr Calvert and Dr Nibaran Sen Gupta, and demonstrated that there was nothing much the matter with Ramendra Narayan Thereafter they gave the poison If we are to accept the plaintiff's times, they persuaded their victim to change his room for no reason apparent at the time, and in anticipation of the agony he was about to suffer Next morning early, at 4-0 or 5-0 A M when the poison began to take effect, one of them ran off to Dr Calvert with the false news that the patient was feeling much better, in order to get a simple medicine for dyspepsia When all the well known symptoms of arsenic poisoning had appeared, they sent off a false telegram to Jaidebpur to the effect that Ramendra was feeling better and was contemplating returning home Thereafter they called in Dr Calvert and Dr Nibaran Sen to see the patient while he was still alive, and might possibly have been saved, and shewed these doctors some at least of the blood-stained fœces and at the same time sent another telegram to Jaidebpur revealing the symptoms which might raise suspicion They were fortunate enough not to arouse the suspicions of Dr Calvert or Dr Nibaran Sen, so as soon as these doctors left the house at dusk, they called in another doctor, Dr B B Sarkar, to see the patient Even his suspicions were not roused Then next morning, they brought in a fourth doctor—Dr Pran Krishna Acharyya—with a request that he should see the patient, but when Dr Acharyya arrived, they refused to let him uncover the body Not content with these persistent attempts to arouse suspicion, they sent one of their number to Dr Calvert while the facts were still fresh in his mind, to ask him to write a letter to Jaidebpur, full of the most obvious falsehoods Then two months later they wrote to a stranger in Darjeeling asking him to get a false certificate of death from Dr Calvert, mentioning as the cause of death, a disease (biliary colic) which is rare in young men and which very rarely indeed ends fatally—and this in spite of the fact that they had revealed in their telegram to Jaidebpur the symptoms of arsenic poisoning, and in spite of the fact that according to the finding of the trial judge (a finding which is based on no evidence whatever) they had sent information to the newspaper to the effect that the death of Ramendra Narayan Roy had been caused by fever accompanied by loss of blood and pain in the abdomen

Such conduct is so unnatural and unreasonable that no court could readily believe it occurred

POSSIBLE MOTIVES

In considering whether there was such a conspiracy, the possible motives of the conspirators deserve examination The learned counsel appearing for the plaintiff has laid great stress on the evidence that Bibhabati Devi, wife of Ramendra Narayan Roy, came of a family of very limited means, and he argued that Bibhabati Devi's brother Satyendranath Banerjee was so affected by this marriage of his sister to a very wealthy bridegroom, that he virtually abandoned his studies and spent his days in idle luxury as a guest of his brother-in-law The suggestion was made that Satyendranath Banerjee became so enamoured of a life of ease and luxury that he must have planned to remove his brother-in-law and secure that brother-in-law's estate for himself. Letters from his mother shew that Satyendranath Banerjee spent more time at Jaidebpur than she approved of, and they indicate that the mother dreaded the effect, on a boy who had his own way in the world to make, of the luxury of the Bhowal family It is easy to exaggerate the importance of these letters, and to my mind they do not prove anything more than the natural anxiety of a mother who had her son's real welfare at heart It may, however, reasonably be argued that the possibility of acquiring great wealth might have attracted Satyendranath Banerjee and induced him to conspire to murder his brother-in-law But this motive could hardly have weighed with the other alleged conspirators—Dr Ashutosh Das Gupta and Mukunda Guin They were servants of the Bhowal Estate, they were more likely to benefit materially if Ramendra Narayan Roy lived to enjoy the estate than if the income of the estate went to an absentee landlord living in Calcutta. No motive for them to join in any conspiracy has been so much as suggested Presumably the theory is that they were won over to Satyendranath Banerjee's views by some promise of future payment Satyendranath was then a person of no means, he could not make any immediate cash payment as an inducement If the conspiracy succeeded, Satyendranath Banerjee could not hope to obtain any money from the estate for some months Yet we are asked to believe that these people relied on a promise of payment in the future, and committed the crime from which Satyendranath Banerjee was to profit, while he remained safely in the background In this connection it should be observed that according to the plaintiff's version, it was Dr Ashutosh Das Gupta who prescribed and administered the poison and who withheld the bloody motions from Dr Calvert's inspection, and it was Mukunda Guin who sent the false telegrams No criminal act seems to be assigned to Satyendranath Banerjee himself If suspicion was aroused, it would fall on others but not on him It is also significant that no suggestion is made that either Dr Ashutosh Das Gupta or Mukunda shewed any signs of having acquired wealth, nor did they apparently join forces with Satyendranath Banerjee, after the party returned to Jaidebpur from Darjeeling In other words, though Satyendranath Banerjee has prospered and prospersed exceedingly, owing to his sister's widowhood, there is no reason to believe that any of the other persons who are supposed to have taken part in the conspiracy has prospered in any way

CONCLUSION

I am convinced that there could not have been any conspiracy to murder Ramendra Narayan Roy, and, therefore, that there was no reason why Dr Calvert should write deliberately false letters or give a false certificate For these

reasons I hold that Dr Calvert must have diagnosed biliary colic and must have treated Ramendra Narayan Ray for that complaint, and I hold further that the symptoms which appeared on May the 8th must have been due to the biliary colic, aggravated possibly by the pills of the prescription *Ex 51 (a)*, and that these pills were administered to Ramendra Narayan Roy in all good faith

PROCURING OF CERTIFICATES OF DEATH AND CREMATION

Before leaving this question of conspiracy I should like to deal with the suggestion that a false certificate of death was obtained from Dr Calvert and false certificates of cremation were obtained from other persons, by Satyendranath Banerjee

On behalf of the plaintiff it has been suggested that all these certificates were obtained by Satyendranath Banerjee

In view of this argument it is desirable to examine with some care the evidence shewing how these certificates were obtained It may be stated at the outset that there is no single witness who states that Satyendranath Banerjee took any steps to obtain the certificates, and there is no document which shews clearly that he did so

Ex Z(120) (a) is a letter from Dr Calvert to Hari Mohan Chandra and reads

"Dear Rai Bahadur,

'Dr Pal asked me to send you this certificate on completion Kindly acknowledge receipt I shall be glad to receive my fees in due course

Yours faithfully,

J T Calvert"

To this letter Hari Mohan Chandra replied

Ex Z(120)

"Dear Sir,

I thank you for the Death Certificate of Kumar Ramendra Narayan Roy of Bhowal

I send Rs 32/- as your fee and shall be obliged if you will kindly send me a stamped receipt for the amount

Yours respectfully,

H M C"

This correspondence shews clearly that somebody from Jaidebpur commissioned Hari Mohan Chandra to obtain the certificate from Dr Calvert There is, however, no letter from Jaidebpur to Hari Mohan Chandra, and no direct evidence as to who commissioned him to obtain the certificate Our

attention was drawn to the following draft of a condolence letter which appears to have been sent by Hari Mohan Chandra to Ranendra Narayan Roy, the elder brother of Ramendra —

Ex Z(126)

"Darjeeling,
11-5-1909

"(My dear Raj Kumar Bahadur)

My dear Mr Sen,

It is extremely to be regretted that (your brother) Raj Kumar Ramendra Narayan Roy Chowdhuri of Bhowal has suddenly died I beg to offer my sincerest condolences to (you and) the family of the deceased and earnestly pray God may give (you and the family) them strength and courage enough to sustain (yourselves) themselves in their cruel bereavement

I am informed that it is the wish of (yourself and of) the wife of your much lamented deceased brother to do some work of public benefit at Darjeeling to commemorate the name of (your lamented brother) her deceased husband

I am just informed that Babu Mohendra Nath Banerjee has proposed to the wife of the deceased to give him some thousands of expenses for some of his purposes I beg to take the liberty of advising the eldest Kumar and the wife of the deceased and yourself not to give any money to Babu Mohendra Nath Banerjee for his purposes If the eldest Kumar and the wife of the deceased wish to do anything at Darjeeling to commemorate the name of the deceased, I should strongly advise (you and your deceased lamented brother's wife) them to subscribe Rs 30,000/- for the additional building required at the Sanitarium

As will be seen from the enclosed copy of the Committee's Circular on the subject, if Rs 30,000/- is subscribed, the upper floor of the building will be named after (your lamented brother) the deceased Kumar and which I think would be the most prominent and the fittest memorial to commemorate his name

I am going to call a public meeting at the Sanitarium to express sorrow at the death of the Kumar

Trusting all well with you,

I remain,
Yours sincerely,
Illegible "

(With Ex 317)

"To the Private Secretary to the Maharajadhiraj Bahadur of Burdwan

"My dear Mr Chatterjee,

You are aware that Kumar Ramendra Narayan Roy Chowdhury of Bhowal is dead I wish to call a public meeting at the Sanitarium Hall to express sorrow I think the fittest person to preside at the meeting *(struck off)*"

Particular emphasis was laid by Mr Chatterjee for the plaintiff on the figure of Rs 30,000/- mentioned in this letter, as this was the sum for which

Ramendra Narayan's life was insured Mr Chatterjee asked us to draw the conclusion from this letter that Satyendranath Banerjee was promising the amount of the insurance money to these Darjeeling residents in return for their assistance in procuring false certificates

In my opinion no such inference is justified In the first place, this letter is not evidence of any offer made by Satyendranath Banerjee It refers merely to gossip of which the writer had heard But, further than this, if it indicated that any proposal had been made by Satyendranath Banerjee, that proposal must have been made to Mohendra Nath Banerjee, the leader of the party opposed to Hari Mohan Chandra

Hari Mohan Chandra was in communication with Ramendra Narayan Roy, not with Satyendranath Banerjee If Satyendranath Banerjee took any steps to obtain the certificates, we might reasonably expect that he would approach Mohendra Nath Banerjee and not Hari Mohan Chandra to get the certificates

This draft read with letters *Ex Z(120)* (*a*) and *Z(120)* quoted above suggests that it was not Satyendranath Banerjee who obtained the certificates There is other material to confirm this conclusion The diary of Satyendranath Banerjee is silent regarding any steps taken by him at this time to obtain such certificates, though it refers to his other activities designed to safeguard his sister's interests At this period, Bibhabati Devi was living at Jaidebpur with her brothers-in-law and was shewing no inclination to join her brother Satyendranath Banerjee had, therefore, no right to act on her behalf There was also no reason at that time why the estate officers should not take the necessary steps in the matter

Later Satyendranath Banerjee succeeded in persuading his sister to come over to his side It is admitted that this did not occur until the 4th of November, 1909

The entries in Satyendranath Banerjee's diary under dates November 4th to November 5th are as follows

"Stay at Jaidebpur—Sister wants Rs 8,000/- in lump sum from the Chief Manager and also the Life Insurance Policy and papers from Jogen She appoints me her agent with powers to take all kinds of papers and documents from the Chief Manager on her behalf All important work requiring her signature will be postponed if I be not at Jaidebpur

Choto Kumar comes to Dacca I stay the night at Jaidebpur Kumar's drinking orgies at night, Ketu Dr 's drunken dances" (*Ex 399(25)*),

and

"The morning at Jaidebpur—photographic enlargements at Kumar's studio Sister writes to Mr C C Guilliland, Resident Secretary of the City of Glassgow Life Insurance Co that she is the only legal heir of the late Kumar Ramendra being a childless widow, and hence entitled to the payment of the sum of Rs 30,000/- for which Ramendra's life was insured Come to Dacca by the midday train A letter from Sushil waiting—he writes to say that his father won't lend money It is not his practice Burra Kumar will be in a great fix Labh Chand has sent in a letter of Attorney demanding payment of about Rs 68,000/- and odd with interest at 12 per cent within 7 days

II train fare to Dacca	15 As
Cooley both places	2 „

(*Ex 399(29) (a)*)

A letter from the Manager of the Estate, F W Needham, to Ranendra Narayan Roy, dated 15th November, 1909 is to this effect —

"My dear Ranendra Sahib,

I have received a letter from the late second Kumar's widow, saying that she has instructed her brother, Babu Satyendranath Banerjee, to realise the money due on her late husband's Life Insurance Policy made with the City of Glasgow Insurance Co She is evidently under the impression that the whole amount of the insurance money belongs to her, but this is not the case, as the premium was always paid by the Estate, and accordingly I think she is entitled by law only to a 1/3rd share of the same, as heir to her late husband's property, after deducting the loan of Rs 10,000/- (Rupees ten thousand) with the interests due on same, which was given to your late brother by the Insurance Co on his policy and which is entered in the list of the Bonded debts However, if you and Rabindra Sahib are willing to forego your shares of this money in her favour, will you kindly let me have a note to this effect, and I will then do the needful, and apply to the Insurance Co for the money and will credit same to Srimati Bibhabati Devi Choudhurani's account, and she can draw the same whenever she wishes to do so All the correspondence is however with her, and I can take no steps until she return the same to me She also writes that she has made up her mind to take the succession certificate from the Original Side of the Hon'ble High Court I do not know who has given her this advice, as the certificate must be applied for from the Dacca and other judges of the districts in which you have properties and there are none within the jurisdiction of the High Court

Will you kindly inform her about this, and I will also write to her, on receiving your reply to this letter

Yours very sincerely,
F W NEEDHAM,
Chief Manager."

15-11-1909

(*Ex 60*)

These documents seem to me to indicate very clearly that steps had been taken by the estate officials in the first instance, and that the papers had been made over to Satyendranath Banerjee after November 4th Mr Chatterjee drew our attention to the fact that the certificates first obtained were not accepted as sufficient by the Insurance Company and that a further certificate of cremation was given by Satyendranath Banerjee and C J Cabral in January, 1910 In this later certificate the age of Ramendra Narayan Roy was given as about 27 years exactly, as in Dr Calvert's certificate, though, in fact, Ramendra was only 25 at the time of his apparent death

It has been argued that this coincidence proves that the statement of age in Dr Calvert's certificate must have been supplied by Satyendranath Banerjee It seems to me much more reasonable to suppose that Satyendranath Banerjee was aware of the statements regarding the age of Ramendra in the earlier certificates and accepted those statements as correct

The only other material on record to throw light on this matter is the absence of any entry in the accounts filed to shew that Dr Calvert's fee for the certificate was paid by the Estate This single detail does not in my opinion justify the conclusion that Satyendranath Banerjee must have obtained and paid for the certificate of Dr Calvert, and the other evidence on record

suggests that he did not do so I am, therefore, of opinion that there is no sufficient reason for holding that the certificate granted by Dr Calvert in July, 1909, was granted at the instance of Satyendranath Banerjee

TIME OF DEATH

The next question to be examined is—When did the apparent death of Ramendra Narayan Roy take place? Was it at 11-45 P M as alleged by the defendants, or was it between 7-0 and 8-0 P M as the plaintiff argues?

DEFENCE EVIDENCE OF DEATH AT MIDNIGHT

All the evidence that came into existence before the arrival of the plaintiff in Dacca in the year 1921 goes to show that death occurred about midnight The obituary notice which appeared in the "Bengalee" newspaper of May the 11th, 1909, stated that "the second Kumar of Bhowal breathed his last at about midnight" It is not known who was the correspondent who sent this message The learned trial judge has drawn the inference that it was inspired by Satyendranath Banerjee, but the only reason for this inference is the fact that the notice supports the defence version There is literally no evidence whatever to connect any one of the defendants with the despatch of this message

Dr Calvert's letter of condolence to the elder brother of Ramendra Narayan does not mention the hour of death, and indeed gives no indication whatever as to the time, but Dr Calvert's certificate mentions the time of death as 11-45 P M Mr Chatterjee for the plaintiff drew our attention to the sentence in the certificate which reads "The attack became acute on the morning of the 8th and he died the same evening", and asked us to accept this as proof that death took place shortly after dusk The suggestion was that the time of death was supplied by the person who obtained the certificate from Dr Calvert, and that this sentence was Dr Calvert's contribution based on his own recollection The entry 11-45 P M is in Dr Calvert's own handwriting The plaintiff's version is that Dr Calvert was not present at the time of death and did not see the body after death If so, Dr Calvert could not have been writing 'evening' in the sense in which the plaintiff wishes to read it, from his own knowledge It seems to me much more probable that Dr Calvert after giving the exact time of death so far as he knew it, used the word 'evening' carelessly in this part of the affidavit I do not think that any inference can justly be drawn from this affidavit in favour of death at dusk

The letter written by Dr Calvert in 1921 in answer to a letter from J H Lindsay mentions that "the Kumar, however, did not recover from the collapse and died the same night"

The other documentary evidence of that period is the diary of Satyendranath Banerjee The entry in this diary was not made until several days after the return of the party to Jaidebpur The entry reads

"May 8th, Saturday, 1909

"Kumar Ramendra expired midnight, Darjeeling, "Step Aside" 4 doctors attended, one his family doctor Ashu Das Gupta 2 Rai Bahadur Nibaran Ch

Ghosh 3 B B Sarkar, M D 4 Lt -Colonel Calvert They were all attending when he died His last words to me a minute before life was extinct were—"tell Ashu that I feel difficulty in breathing" Bibha began to have fits The doctors melted away Only 2 nurses remained, Sariff Khan was mad Sent Behara for Sejomama who came at about 3 in the morning Message to Uttarpara and Jaidebpur Sent man to the Sanitarium for men to get the corpse removed for funeral"

The circumstances in which this diary was written will be considered hereafter, but it will suffice to remark here that no convincing explanation has been offered why a false entry should have been made

JUDGE'S REASONS IN SUPPORT OF DEATH AT DUSK EXAMINED

The learned trial judge gave six reasons for holding that Ramendra Narayan Roy was taken for dead at dusk The learned advocate for the plaintiff has based his case on those six reasons and on the direct evidence of a witness named Ram Sing Subha This evidence and the learned judge's reasons must, therefore, be examined

Ram Sing Subha's evidence did not receive at the hands of the trial judge the critical examination it deserved This witness is one of the most important of all the witnesses examined by the plaintiff On his testimony the plaintiff relies for proof of a number of important facts It is necessary, therefore, to study his evidence and determine whether the witness is truthful and reliable, or whether, as the defence argue, he is obviously a perjured witness deliberately tutored to give false evidence The learned judge seems to have accepted Ram Sing Subha as a witness of truth—though with some hesitation

EVIDENCE OF RAM SING SUBHA

To appreciate the evidence of this witness it is necessary to go back to the Defamation case instituted by Dr Ashutosh Das Gupta in 1921 It is admitted that the prosecution in that case was conducted by the Bhowal Estate, and that the defence was financed by the plaintiff out of the subscriptions raised for him In that case the defence advanced a story that Ramendra Narayan Roy's body was taken out for cremation at night, that the funeral party were driven away by a sudden storm and that Ramendra Narayan was rescued by sannyasis They went further and adduced evidence to shew that one Pengumche, a Lepcha, was missing from the Darjeeling hospital from the night of May the 8th and they asserted categorically that it was the body of this Lepcha which was burned as the body of Ramendra Narayan Roy on the 9th of May The plaintiff was not a party to that criminal trial, and he cannot be held responsible for statements made or evidence given therein But in the year 1926, the plaintiff submitted a memorial to the Board of Revenue in which he accepted this story as true, and when J H Lindsay was cross-examined this story was put to him as a well known fact

> "Q —Do you know that the books of the Victoria Hospital, Darjeeling, and the aunt's evidence go to show that the dead body found covered in the morning at "Step Aside" was that of a stout and

fair complexioned Lepcha, named Pengumche who was a warder of the said hospital?

A—No"

The story has since been dropped The learned counsel for the plaintiff informed us blandly that he had not in fact given up this story, but he had decided not to offer evidence in proof of it, because the burden of proving whence the substituted body was obtained, did not lie upon his client A more unconvincing explanation could scarcely be imagined The great difficulty of obtaining a dead body to substitute in place of the missing body has been one of the main obstacles in the way of the plaintiff's success It is simply incredible that the plaintiff should have withheld evidence shewing how the substituted body was obtained, if that evidence would bear inspection The only reasonable inference, in my opinion, is that the evidence offered in the Defamation case would not bear inspection in the light of subsequent investigation into the matter

Ram Sing Subha was the agent employed by the plaintiff to obtain the witnesses who deposed to the story of Pengumche in the Defamation case This fact alone would go a long way to shake his credit

The witness was cross-examined regarding his previous activities, and he flatly denied having made any efforts to procure witnesses, but when confronted with his own letters and telegrams, had to admit that he acted as *tadbirkar*

There can be little doubt that this witness procured false evidence in the Defamation case, and then falsely denied having done so

A DELIBERATE LIAR

His evidence in the present case seems to me to bear clear indications that the witness is a deliberate liar An attempt was made in the lower court to prove that Bibhabati Devi was not allowed to attend her husband during his last illness, and that except for allowing her a last look at the dead body at about 9-0 P M when it was being taken out for cremation, she was kept locked in her own bedroom

Ram Sing Subha was induced to support this story His deposition runs

> "I was going every day for 10 or 12 days when one day I did not find the second Kumar Sala Babu said that he was ill and could not be seen I went next day That day also I did not meet the Kumar as Sala Babu said he was ill I asked him what the illness was Sala Babu said it was hill dysentery Next day I went to Bannockburee Garden—I had to go to that every Saturday I was there till 2-30 or 3 P M After that I went to the races at Lebong Parade Ground I was there a little over an hour and a half Then I came home I took my meal Some 2 hours after I came home I heard cries and a row at the "Step Aside" I went to the "Step Aside" It was then 7 or 7-30 P M I heard the crying going on—I got in and went upstairs I went to a small bed-room towards the chowrasta I found the second Kumar lying on a mattress spread on the matting on the floor I found him dead and people said he was dead The body was wholly covered, head to foot, by a white cloth In the room I found Dr B B Sarkar, Dr Ashutosh and Sala Babu They were seated on something

spread on the floor I was there for some 8 to 10 minutes I exchanged no conversations with these three persons there They were seated quiet I had heard below when coming upstairs that the Kumar had died The third room from the room in which the Kumar lay was a room with glazed doors *I could see the Ram through the doors lying on an iron cot there, and crying aloud—very aloud The room in which the Ram was I found locked up from outside I saw the lock",*

but in cross-examination he deposed

"In the room, marked *A* Ram lay locked up as I said The door lock was locked, there was no padlock I did not see if the key had been turned, but the door was shut"

It is clear that he had no reason whatever for saying that the room was locked, and it seems to me equally clear that this was another piece of false evidence deliberately given

But the most striking part of this witness's evidence deals with the story of the abortive evening cremation He tries to suggest that he was informed of the disappearance of the dead body from the burning ghat on the night of the 8th of May Thus he deposes

"I returned home I went to bed I was feeling very sad After I had gone off to sleep, a Nepali boy servant of the Kumar woke me up The servant's name I remember It was Sree Lal There was no clock in my room when I was awakened The boy said that there was some *golmal,* and asked me to come (Question objected) I did not go I did not and said that I could not go as I was tired and never mind what was happening I do not know if Sree Lal is living

I did not met Sree Lal next day I mean I saw him next day in the *kuthi* but had no speech then with me 10 or 12 days later, I asked him why he had gone to call me"

It appears that in the Defamation case, he had been much more definite in his statements and had fixed the hour at which he had been roused by his servant

His cross-examination in this case reads

"*Q* —Did you say in the Defamation case that the Nepali servant called you 3 or 3½ hours after?

A —I was asleep and do not know how long after he came, but I might have said so

Q —"About 3 or 3½ hours after a Nepali servant of the Kumar went to me, woke me up and told me something"—did you say this in the Defamation case?

A —I might have said so, but I don't remember how long after he came"

The absurdity of his story is seen from a further statement in his examination-in-chief

"15 or 16 days after the cremation I described arose a rumour

Q —What was the rumour? (Objected to Allowed for a purpose)

A —That the second Kumar could not be cremated at night owing to rain and storm"

This witness admittedly went to "Step Aside" on the morning of May the 9th, and made arrangements for a cot to be supplied, for carrying the corpse to the cremation ground Yet he asked no questions regarding the previous night's cremation

The whole story is too silly to merit serious consideration I am satisfied that this witness is wholly unworthy of credit, that he gave false evidence and was coached in the false evidence he was to give

Mr Chatterjee advanced two arguments in favour of believing this witness As I have stated above, this witness procured the cot for the morning cremation, though Satyendranath Banerjee denied that he did so We are asked to hold that because the witness told the truth in one unimportant detail, he must have told the truth throughout This is a very unconvincing argument The second argument urged in favour of the witness is that he was the first witness to mention the fact that Dr B B Sarkar saw Ramendra Narayan Roy during his illness

VISIT OF DR B B SARKAR

This visit of Dr B B Sarkar is one of the incidents which has given rise to a good deal of argument It is admitted now that Dr B B Sarkar came to the house for the first time between 6-0 P M and 7-0 P M on the 8th of May and saw Ramendra Narayan Roy He seems to have examined the patient, felt his pulse, taken his temperature, etc, but he did not prescribe any treatment The defence version of the visit is that Satyendranath Banerjee had gone out about dusk that day and had met his uncle Suryyanaram Satyendranath had explained to Suryyanaram how ill Ramendra Narayan Roy was and that Dr Calvert and Dr Nibaran Sen were in attendance Suryyanaram was himself in poor health and was being treated by Dr B B Sarkar, so he advised Satyendranath to consult Dr B B Sarkar Satyendranath yielded and Suryyanaram brought in Dr Sarkar Naturally as Dr Calvert was in charge, Dr Sarkar did not prescribe any treatment

The plaintiff's version is that Dr Calvert and Dr Nibaran Sen had recognised that Ramendra Narayan Roy was dying and that nothing could be done to save him, so they had left him to his fate But Bibhabati Devi (though locked in her room and not permitted to see her husband at this stage) had driven Satyendranath Banerjee out to find another doctor, and Satyendranath had brought in Dr B B Sarkar Their further case is that Ramendra Narayan died just after Dr Sarkar's arrival, and this fact explains the absence of any treatment by this doctor They allege that it was Dr B B Sarkar who pronounced Ramendra Narayan Roy to be dead

For the plaintiff, it has been argued that the defence witnesses tried to suppress all knowledge of Dr B B Sarkar's visit, and that as Ram Sing Subha was the first witness to refer to it, he must be a truthful witness The argument carries no weight with me It is obvious that the contents of the diary of Satyendranath Banerjee were known to the plaintiff's advisers from the very beginning of the case That diary refers to the fact that Dr B B Sarkar attended Ramendra Narayan Roy Therefore this fact was well known to the plaintiff's advisers It is further obvious that the visit of Dr B B Sarkar had no special significance, if the defence version is true It was natural for the defence witnesses to omit any reference to it, if they remembered it it would not be surprising if they had forgotten the visit

None of the early witnesses for the defence were cross-examined about the visit, and the plaintiff's version of the visit was not put to them They did not deny the visit, they merely omitted to refer to it Not a single defence witness—so far as I am aware—denied the visit when it was put clearly to him

As the plaintiff's advisers knew of Dr B B Sarkar's visit from Satyendranath Banerjee's diary, it was easy to instruct Ram Sing Subha to depose about it The mere fact that Ram Sing Subha was cross-examined about the visit does not indicate that the visit was disputed, it merely indicates that the witness's truthfulness was questioned That is the less surprising when it is considered that even on this topic the witness's evidence is obviously untrue Thus he tries to make out that Dr B B Sarkar was one of the physicians who treated the patient throughout As his evidence in cross-examination shews —

> "*Q* —Did you know then which doctors were treating the Kumar, during Thursday, Friday and Saturday?
>
> *A* —Nibaran Sen and Dr B B Sarkar
> To Court—This I heard but did not see
> I heard it from servants I can't name them "

This is nobody's case and it is difficult to regard this as a *bona fide* mistake This witness was the agent for the owner of "Step Aside" and resided near that house he was the person who attended the needs of the tenants on behalf of his master He was likely to attend on the morning of the cremation to render assistance The mere fact that the witness did take part in the morning cremation and did depose truly about some unimportant details is no reason for overlooking the obvious lies he has told regarding other details I regard the witness as one whose testimony on contentious matters carries no weight whatever

OTHER REASONS COURSE OF ILLNESS

His reasons for believing that Ramendra Narayan Roy died between 7 and 8 P M have been given by the learned trial judge at pages 355 to 365 of his judgment

The first reason given is that the course of illness points to death as near In my opinion the reason is quite unsatisfactory and inconclusive It is impossible to say with any certainty at what time the various symptoms upon which the learned trial judge dwelt actually occurred There can be no doubt that there was collapse of the patient, that his body did get cold and that the body was rubbed with ginger powder before dusk The learned trial judge held that the evidence established that collapse occurred about mid-day I am not convinced by his reasoning, but it is not necessary, in my opinion, to decide whether collapse did or did not occur at that time What is more important is the fact that no doctor has been asked to give an opinion whether death, even assuming the hours of the symptoms recorded, was likely to occur or not, or was more likely to have occurred at dusk than at midnight It seems to me that nobody would hazard an opinion that because the patient began to get cold at a certain time death was more likely to have happened, say, within two hours than after six hours It is true that we have no reason for holding from the symptoms alone that death could not have occurred at dusk, but we have also no reason for holding that death at dusk was more probable than death at mid-night All the witnesses who were present in the house have asserted on oath that death took place at mid-night.

In the year 1921 Col Calvert wrote his letter *Ex Z(127)*, in reply to the letter of J H Lindsay Mr Chatterjee arguing on behalf of the plaintiff has contended that this letter shows honest memory and has further contended that it proves that Col Calvert was not present at the death of Ramendra Narayan Roy, and he has argued further that Dr Calvert must have left the patient about dusk after giving up all hopes of the patient's recovery The last but one sentence in that letter reads "On my last visit his Bengalee medical practitioner was present, and arrangements made for the late Col Macrae, I M S, the I G C H, Bengal, to see him in consultation in the morning Col Macrae had been Civil Surgeon at Dacca and knew the family" This letter seems to me to indicate that Dr Calvert at all events did not anticipate that Ramendra Narayan Roy would die before the following morning If, as the plaintiff's party contend, Calvert left about dusk and did not see the patient again, he must have left expecting to see him on the following morning I am of opinion that the evidence on record with regard to the progress of the illness does not indicate that death at dusk was more probable than death at mid-night

NO REPLY TO BARA KUMAR'S TELEGRAM

The second reason given by the learned trial judge is that no telegram was sent from Darjeeling in reply to the telegram of Ranendra Narayan Roy which was despatched from Jaidebpur at 3-10 P M standard and which was in these words "Very anxious Wire condition very often Treat with best medical help Wire immediately present condition" It is argued that this telegram must have been delivered in Darjeeling at about 6 P M and that if Ramendra Narayan lived for any length of time after 6 P M, an answer stating his condition at that time would have been sent In my opinion, the argument is inconclusive We do not know at what time the telegram was received, whether it was received in time for an answer to be sent that night, or whether it was received at such a late hour that the party in Darjeeling considered it desirable to wait until the morning before replying It seems to me impossible to argue from the fact that no answer was sent to this telegram that death must have occurred before mid-night

INFERENCE FROM DR B B SARKAR'S VISIT

The third reason advanced by the learned trial judge is in connection with the visit of Dr B B Sarkar to "Step Aside" on the night of the 8th of May It has been argued on behalf of the plaintiff that Dr Calvert and Dr Nibaran Sen had given up the case as hopeless and had left for home somewhere about sunset, and that thereafter presumably on pressure from Bibhabati Devi Satyendranath Banerjee had been sent out in search of another doctor Satyen has deposed that he went out about dusk on that evening and that by chance he met his uncle Suryyanarain near the *Chowrasta* just before dusk and had a conversation with Suryyanarain about Ramendra's condition He states further that it was his uncle who brought Dr B B Sarkar to the house, but he denies that it was he who asked Suryyanarain to bring a doctor The question put to him was "I am putting it to you that you asked Suryyanarain Babu to bring a doctor because you knew that neither Dr Calvert nor Nibaran Sen was at the "Step Aside"?" It has been argued that Dr Calvert's evidence shows that he (Dr Calvert) was not at "Step Aside" when Dr B B Sarkar

was called in In the interrogatories for the examination of Dr Calvert question 14 reads "Did you know Rai Bahadur Nibaran Chandra Sen, Assistant Surgeon of Darjeeling in 1909? If so, did he attend the Kumar during his last illness in Darjeeling?", and the answer to that was, "Yes He did" Question 15 reads "Do you remember if any other physician attended the Kumar during his last illness? If so, can you name any?" The answers are "I remember the Kumar had his own private medical attendant who was present during his illness I can't remember his name", and in cross-examination he stated "He had his own physician with him and Dr Nibaran Chandra Sen of the Victoria Hospital" From this evidence it is argued that Dr Sarkar must have come to the house at a time when Dr Calvert was not present

The evidence of the witnesses is conflicting Bibhabati deposed "When Suryyanarain came with the doctor, Drs Calvert and Nibaran were in the "Step Aside" I believe I have direct knowledge of that in the sense that they were coming and seeing the Kumar every now and then, and that was not possible unless they were in the house" Again, in answer to the question, "I put it to you that you cannot deny on oath that when this doctor came Drs Calvert and Nibaran were not in the house?", she answered, "I say they were in the house"

She was asked, "Can you swear they were?", and she answered, "I did not see them seated in the house, but they were coming in so frequently that they must have been in the house"

Dr Ashutosh Das Gupta deposed as follows "Dr Sarkar came at dusk or a little after dusk He came at about 8 P M Col Calvert was there when Dr Sarkar came Dr Nibaran Sen was also present then When Dr Sarkar called, Dr Calvert and Nibaran Sen were in the room in which the Kumar was or in the next room I can't say who called Dr Sarkar I heard afterwards, 1 or 2 years ago, who had called them I do not remember from whom I heard it at Dacca or Jaidebpur I can't say whether I heard it a year ago or two years ago I knew who had brought him Dr B B Sarkar examined the Kumar with his stethoscope and felt his pulse When he did so, Dr Nibaran and Dr Calvert and I were present"

It has been argued with some force that a junior doctor like Dr B B Sarkar could not possibly have examined the patient in the presence of or to the knowledge of a doctor of the standing of Dr Calvert Dr Calvert was one of the leading physicians in the province Dr Sarkar was an ordinary doctor with little or no practice It seems to me, therefore, that it is unlikely that Dr Sarkar examined the patient in the presence of Dr Calvert, and I think further that the evidence of the witnesses taken as a whole indicates that they have no clear recollection whether in fact Dr Calvert was present when Dr Sarkar examined the patient It is an admitted fact that Dr Sarkar did not prescribe for the patient, nor did he interfere in any way with the treatment I am not satisfied that it is impossible for Suryyanarain to have brought in his own doctor and for that doctor to have examined the patient and given an opinion to the relatives regarding his condition, even though the case was in charge of Dr Calvert I think this may have been done at a time when Dr Calvert was not in the room, but it does not follow that it was done at a time when Dr Calvert had given up the case Dr Calvert may have been in another room, it may be that this visit occurred after Dr Calvert had gone home for his dinner and before he returned after dinner It is impossible in my opinion to attach very great importance to the statement of the witnesses regarding the exact time when each event happened

I do not think, therefore, that the visit of Dr Sarkar establishes that Dr Calvert and Dr Nibaran had given up the case as hopeless Mr Chatterjee drew our attention to the evidence of Bibhabati Devi regarding the result of Dr Sarkar's examination The evidence is as follows "This doctor after examining the Kumar said, did he not, that the Kumar had gone past all hope" The answer was, "He did not say that in my presence" The next question put was, "Did you not cry loudly at or a little after dusk?" The answer was, "No When my *mama* talked to me after the doctor had examined the Kumar, tears came into my eyes, but I did not cry aloud" The learned counsel for the plaintiff has argued that this evidence of Bibhabati shows that Dr Sarkar announced to her that her husband was already dead and that she burst into tears This interpretation seems to me wholly unjustifiable

The diary of Dr B B Sarkar, *Ex Z(215)*, was produced by his widow Dr B B Sarkar is dead and was not available as a witness Under the head of 8th of May there is an entry, "Kumar of Bhowal some hours" This entry does not indicate that he was present at the death of Ramendra Narayan Roy

TELEGRAM OF DEATH

The fourth reason given by the learned trial judge for his conclusion as to the time of death is based on the fact that the telegram sent from Darjeeling to Jaidebpur announcing the death of Ramendra Narayan Roy has not been produced by the defendants There can be no doubt that a telegram was sent, and Satyen's diary contains an entry under date 8th of May to the effect that messages were sent to Uttarpara and Jaidebpur From the fact that this entry is under the date 8th of May the learned counsel for the plaintiff has argued that the telegram to Jaidebpur must have been sent before mid-night on the 8th This argument is singularly unconvincing The first entry under this date reads "Kumar Ramendra expired midnight" The sentence preceding that regarding the messages to Uttarpara and Jaidebpur reads "Sent Behara for *Sejomama* who came at about 3 in the morning" This diary was not written until at least ten days or a fortnight after the 8th of May It seems to me quite impossible to draw any inference as to the time when this telegram was sent from the entry in the diary In his evidence Satyendranath Banerjee states that he did not see at any time the telegram sent from Darjeeling announcing the second Kumar's death He admitted that the phrase 'messages to Uttarpara and Jaidebpur' in his diary meant telegraphic messages were sent, but he added that he could not say who actually wrote the messages The evidence of the other members of the Darjeeling party is equally unsatisfactory The evidence of Birendra Chandra Banerjee in the Sripur case was that after the death on the night of death Dr Calvert sent a telegram to Jaidebpur reporting the death of the second Kumar In his evidence in this court he deposed "I do not know whether Dr Calvert sent a telegram to Jaidebpur that night I do not know whether any telegram was sent that night Dr Calvert was requested to send a telegram in my presence, and because of this request I believe a telegram was sent" Dr Ashutosh Das Gupta in his evidence was asked "Is it true Dr Calvert did not send any telegram to Jaidebpur?", and he answered, "I do not remember his sending any" From this evidence it appears that either the witnesses or the Darjeeling party have no clear recollection regarding the sending of the telegram, or else they are deliberately suppressing information on the point

The telegram was delivered at Jaidebpur on the morning of the 9th of May It appears that after receipt of the telegram of the 8th of May Ramendra

Narayan's younger brother Rabindra Narayan Roy had decided to go to Darjeeling to attend on his brother He had set out from the Rajbari in time to catch the 8-30 A M train from Jaidebpur station As he and his party were approaching the station, a peon delivered to them a telegram announcing the death Thereupon Rabindra Narayan and his party returned weeping There can be no doubt whatever that the telegram announcing the death was delivered at Jaidebpur between 8 and 8-30 in the morning of the 9th. That telegram has not been produced The defendants have offered an explanation for the non-production of the telegram They state that the telegram is no longer in their possession or at all events cannot be traced

DEFENCE EXPLANATION FOR NON-PRODUCTION

It appears that on the 5th of December, 1916, Saraju Bala Devi, widow of the eldest of the three brothers, wrote a letter to F W Needham, Manager, under the Court of Wards, at Jaidebpur as follows "Sir, my husband's papers are lying in a box or two in Private Secretary's office, my servant Tana will point out the boxes to you, the papers are required for the allocation purposes I have to request you will kindly deliver the same to my servant Tana The papers have no connection with your Estate management, but they are Accounts, Vouchers, Receipts, Bills, Memos, so forth, what are required for allocation purposes You can keep a list of the papers if you like Yours faithfully, Sarajubala Devi" (*Ex 370*) On this F W Needham passed an order directing that the Private Secretary would make a list of the papers Thereafter on the 10th of December, 1916, the Private Secretary Jogendra Nath Banerjee wrote to Saraju Bala Devi stating that he would have the list and papers despatched as early as possible This letter is *Ex 372* It appears that the letters were not despatched until 18th April, 1917, for we have a letter of that date from F W Needham to Saraju Bala Devi which reads "Dear Madam, with reference to your No 660, dated 5-12-16, I have the honour to send by railway parcel all private letters etc of the late eldest Kumar that were found in a box in Private Secretary's office, keeping a list thereof in my office as requested in your letter under reference. The railway receipt together with a copy of the list is enclosed Please acknowledge receipt and oblige I remain, Yours faithfully, F W Needham, Manager" (*Ex 65*) The defendants did not produce in court a copy of the list retained by F W Needham It appears that the list sent to Saraju Bala Devi was produced in court during the examination of the witness Ashutosh Das Gupta, but was returned to her through oversight Neither the original nor the copy was thereafter produced in the lower court, and the lower court was, therefore, not in a position to state whether that list contained any reference to the telegram The other telegrams sent from Jaidebpur during the illness were admittedly made over to Saraju Bala Devi We directed the Court of Wards and Saraju Bala Devi to produce their copies of this list, and ultimately the list which was sent to Saraju Bala Devi was produced in court before us That list has been examined and we find that there is nothing in the list to indicate that the telegram of death was, in fact, sent to Saraju Bala Devi

After the appearance of the plaintiff in Dacca in the year 1921 J H. Lindsay, Collector of Dacca, wrote to Saraju Bala Devi a letter (*Ex 55*) in these terms · "Dear Madam, Kindly let me have in original for perusal, all the letters and telegrams in connection with the illness, death and cremation of the late second Kumar of Bhowal which passed between the first Kumar

of Bhowal and the persons who went with the second Kumar to Darjeeling. I am told that they are in your custody Yours sincerely, J H Lindsay, Collector, Dacca" In answer to this letter Saraju Bala Devi forwarded to J H Lindsay all letters and telegrams received by her, and when she deposed in this suit on commission she filed a list of the telegrams which she had sent to J H Lindsay That list is *Ex 260* It contains all the telegrams to which reference has already been made in this judgment It seems, therefore, that the telegram announcing the death was not sent to Saraju Bala Devi in 1916 No reason why it should have been withheld at that time has been advanced, and I can only assume that it was not sent because it was not found among the papers of Ranendra Narayan Roy A reasonable inference from this correspondence would be that the telegram had been lost or mislaid before April, 1927

The learned counsel for the plaintiff, however, has drawn our attention to the evidence of Sarada Prasanna Ghosh who was examined on commission in this case Sarada Prasanna Ghosh was Wards Deputy Collector at Dacca from 1923 to 1925 The papers in the Collectorate connected with the appearance of the present plaintiff and his claim to be Ramendra Narayan Roy were in charge of this gentleman He deposed that he as Wards Deputy Collector read the telegram about the death of the second Kumar coming to the eldest Kumar from Darjeeling But this is the translation of his evidence which appears in the paper book "I, as Wards Deputy Collector, went through the telegram about the death of the second Kumar coming to the eldest Kumar from Darjeeling" Mr Chaudhuri for the defendants has argued that the correct translation of his evidence is that he had read as Wards Deputy Collector the fact that a telegram announcing the death of the second Kumar had been despatched from Darjeeling I hesitate to say that this translation is not a possible translation of the statement of the witness, but it seems to me more likely that the translation given in the paper book is correct and that the witness stated that he had actually seen the telegram That telegram is not forthcoming, and the inference has been drawn by the learned trial judge that that telegram has been withheld and has been withheld because its contents would not support the defendants' case

ORAL EVIDENCE AS TO CONTENTS

The other circumstances, however, have convinced me that this inference is not justified Both parties have given oral evidence as to the contents of the telegram For the defendants Phani Bhusan Banerjee, a distant relative of Rabindra Narayan Roy, deposed that he remembered the contents of the telegram and that it read *"Heart rends to write Kumar expired last midnight"* For the plaintiff Sati Nath Banerjee deposed as follows "Next morning at about 8, Chhoto Kumar and I set out for the station to catch the 9 o'clock train When we were in the east of the Post Office a man handed a telegram to Chhoto Kumar Chhoto Kumar tore the cover open and asked *দেখ কি লেখচে* (see what it writes) I saw it I read *"Mejo (or Mejo Kumar,— I don't remember whether Mejo or Mejo Kumar) expired this evening'* This I distinctly remember I said to Chhoto Kumar *সব শেষ হয়ে গেছে* (All is over)"

In order to understand how the telegram came to be delivered at Jaidebpur between 8 and 8-30 A M we called for the Post Office Guide of the year 1909, and the same was produced in court That Guide shows that

ordinarily Darjeeling Post Office was open for the receipt and despatch of telegrams from 7 hours to 21 hours on week days, from 8 hours to 10 hours and from 16 hours to 18 hours on Sundays whereas the Darjeeling Railway Telegraph Office was open for the receipt and despatch of telegrams from 6-30 hours to 21 hours both on week days and Sundays The Jaidebpur Post Office was open for the receipt and despatch of telegrams from 7 hours to 9 hours and from 12 hours to 17 hours on week days and from 8 hours to 9 hours and 16 hours to 17 hours on Sundays whereas Jaidebpur Railway Telegraph Office was open for the receipt and despatch of telegrams for 24 hours every day, week day or Sunday Under the rules in force at the time ordinary telegrams could be received at the various offices during the hours mentioned above Express telegrams could be received at any time for despatch, though if they were received after hours a late fee was required But telegrams were only received after hours if the terminal office was open or its attention could be gained It was further provided in the rules that telegrams could not be received after hours at Railway Telegraph Offices even though late fees were offered, and that telegrams were not despatched to Railway Telegraph Offices after those offices were closed It is obvious, therefore, that if a telegram was sent from Darjeeling on the 8th of May, it could have been sent before 9 P M either from the Post Office or from the Railway Telegraph Office, but it could not have been despatched from either of those offices to the Jaidebpur Post Office on that night It would have to be despatched to the Jaidebpur Railway Telegraph Office If the telegram was despatched on the morning of the 9th of May which was a Sunday, it could have been despatched in the ordinary way from the Darjeeling Head Office after 8 A M or before that hour on payment of a late fee, or from the Darjeeling Railway Telegraph Office after 6-30 A M Jaidebpur Railway Telegraph Office was open for the receipt and despatch of telegrams, day and night, and it was the duty of the officer on duty at the telegraph office to deliver a telegram received by him as soon as possible

HOUR OF RECEIPT AT JAIDEBPUR

In this connection it is interesting to read the evidence of one Niranjan Roy who deposed on behalf of the plaintiff in this case This witness is a Railway servant and deposes that he was a Signaller at Jaidebpur Railway Telegraph Office on the 9th of May, 1909 His evidence reads as follows "I have no recollection but perhaps a telegram announcing death of Kumar came that night I could say definitely if I am shown a copy of that Such recollection as I have I am speaking from, as there was, I remember, a *golmal* (row) at the station that the Kumar was dead I would be generally at the station even when off duty as my *basha* was quite close" In cross-examination the witness stated "The *golmal* over second Kumar I spoke to was at about 9-30 or 10 P M It was a *golmal* among the staff No outsiders would then be present at that hour" The question was put to him, "Did you send for information at the Rajbari"? Answer was "No" The suggestion was that the telegram announcing death was received at the Railway Telegraph Office at about 9-30 or 10 P M on the night of the 8th of May In re-examination a question was put to the same witness as follows "If a message had come, can you (sic) and if it was not sent to the Palace, can you explain why? (Objected to Allowed)", to which he answered, "Possibly, not to upset the Rajbari There was no train at night for anybody going to Darjeeling The earliest train would be about 8 o'clock next morning" The

learned trial judge has accepted the evidence of this witness as truthful evidence and has come to the conclusion that the telegram was received between 9-30 and 10 P M and was withheld by the station staff in order that the family might not be upset that night To my mind, this story is too fanciful I cannot believe that a telegram received before 10 P M would be withheld by the Telegraph Office in order that the family of the recipient should not be upset The Telegraph Rules require that a telegram received at the Railway Station should be immediately despatched by a messenger The position of the Bhowal family at Jaidebpur was such that it is certain that these instructions would be strictly followed in their case, and that there would be no neglect or delay in the delivery of important telegrams addressed to them I am satisfied that the evidence of this witness is false evidence, and I am satisfied that the telegram must have been delivered immediately after it was received, and that, therefore, the telegram was not received in Jaidebpur until 8 A M at the earliest It is the case for the plaintiff that the telegram was received at the Railway Telegraph Office The defendants have not made a definite case whether it was received at the Railway Telegraph Office or at the Postal Telegraph Office It is true that one witness states that the telegram was delivered by a postal peon, but it seems to me that this is a detail which he could not possibly remember and on which no reliance could be placed The fact that the telegram was received at 8 A M or within a few minutes thereafter suggests that it must have been received at the Jaidebpur Railway Telegraph Office, most of the other telegrams sent from Darjeeling to Jaidebpur during the course of the illness were sent from the Railway Telegraph office at Darjeeling to the Railway Telegraph Office at Jaidebpur, and in view of the fact that the Railway Telegraph Office at Darjeeling was open at 6-30, whereas the other telegraph office was not open till 8 A M, it seems at least highly probable that the telegram announcing death was despatched from the Railway Telegraph Office at Darjeeling somewhere about 6-30 A M In view of the rules contained in the Post and Telegraph Guide, the telegram could not have been despatched from the Darjeeling Postal Telegraph Office after hours if it was despatched to the Jaidebpur Railway Telegraph Office, it could not have been despatched after hours if it was sent from the Darjeeling Railway Telegraph Office Therefore, it seems to me that no telegram could have been sent on the night of May the 8th to arrive at Jaidebpur Railway Telegraph Office at 8 A M on Sunday, May the 9th In other words, the telegram announcing death must have been sent some time in the morning of May the 9th If that is so, the telegram could not have read "Mejo expired this evening", if he had expired on the previous day Moreover, if the telegram was not sent until the morning of May the 9th, it was not sent until, according to the plaintiff, a substitute body had been obtained and a sham funeral decided upon and until after the conspirators had decided to assert falsely that the death was at midnight These circumstances seem to me to indicate beyond all possible doubt that the telegram announcing death was sent on the morning of May the 9th and could not have supported the plaintiff's case I hold, therefore, that the evidence regarding the telegram of death far from supporting the plaintiff's case supports the case put forward by the defendants

NO COOKING AT 'STEP ASIDE' THAT NIGHT

Another reason advanced by the learned trial judge for holding that death occurred at dusk was that one of the witnesses asserted that no cooking took

place that evening at "Step Aside" It is contended that it was because Ramendra Narayan Roy had apparently died that no cooking took place. The evidence whether there was cooking or not is most conflicting Some witnesses say there was cooking, some say there was not It seems to me impossible after this lapse of time for witnesses to remember such a detail Whether in view of the serious condition of Ramendra Narayan Roy after sunset people delayed taking their meals until a late hour, and then owing to his death did not dine at all, or whether owing to their anxiety no meals were prepared are details which it is impossible now to determine I am unable to decide from the evidence adduced whether or not there was any cooking in "Step Aside" that night

EVIDENCE OF PROF S N MAITRA

The most important evidence on which the learned trial judge has relied in order to come to his finding regarding death at dusk is the evidence of Mr S N Maitra, a member of the Indian Educational Service, who deposed in this case on behalf of the plaintiff Mr S N Maitra was staying in Darjeeling during the summer vacation of 1909 He was staying in Lewis Jubilee Sanitarium from the third week in April to the third week in June He deposed that before 8 P M one night he got news of the death of the Kumar of Bhowal His evidence is so important that it ought to be quoted in full "In 1909 I went to Darjeeling during summer vacation I went to Darjeeling during the long vacation—from 3rd week in April to 3rd week in June In May, 1909, I was at Darjeeling I stayed at Lewis Jubilee Sanitarium I was there with my wife In May, 1909, I do remember receiving news of the death of the Kumar of Bhowal I got this news in the evening .It must have been before I had taken my dinner That is, it must have been before eight I was in the Common Room of the Nripendra Narain Hall of the Sanitarium There were several friends there I distinctly remember that there was a group attached to the National College One of them was Radha Kamal or Radha Kumud, who is now Professor at Lucknow—the elder of the two brothers, Radha Kamal and Radha Kumud Babu Haran Chandra Chakladar was also there There was another man whose face I remember There was probably one Nibaran Mukherjee, but of him I am not sure I am also absolutely sure of the National College group, but there was also a young man who was a Zamindar of North Bengal and another of East Bengal We were seated in the Common Room when news was brought to us that some Kumar of Bhowal had just died, and the man who brought the news presumably made a request for men to carry the dead body to the burning ghat Of the request I am absolutely sure I did not go to the cremation ground I did not go and possibly because I was told that the burning ground was a long way down a steep hillside and there was no knowing when I was going to come back and my wife was there I felt an impulse to go with the party going, but did not "

Mr Maitra was a man of culture, of position and acknowledged probity His love of truth and the care he took to make sure that he always spoke the truth are well known The learned counsel on both sides entertained us with anecdotes illustrating the care that Mr Maitra always took to ensure that his statements were truthful and accurate There can be no possible doubt that this witness gave evidence which he believed to be strictly true But in order to determine whether his evidence can be relied upon, other circumstances connected with it must be referred to On the following Sunday, that

is to say, on the 16th of May, 1909, a public meeting was held at the hall of the Lewis Jubilee Sanitarium to express sorrow at the sudden death of Raj Kumar Ramendra Narayan Roy of Bhowal That meeting was attended by Mr S N Maitra Mr S N Maitra was a gentleman in great demand as a vocalist at public meetings, and on that occasion Mr S N Maitra was persuaded to sing After having sung one song he was cheered and encored Mr Maitra was at first reluctant to sing the second song, but his reluctance was overcome The reason for his reluctance and the manner in which it was overcome appears from the evidence of Hiralal Roy, another witness examined on behalf of the plaintiff This witness deposed as follows "I remember the condolence meeting Professor Maitra was there and Dr Mukherjee was there and perhaps Mr Rakshit also At this meeting Professor Maitra sang

"*Q* —What was the effect of that? (Objected to Allowed)

A —There was a request for more songs—by claps and by words also And he sang one or two more songs Dr Maitra did not straightway agree to sing

Q —Why? (Objected to Allowed)

A —Because he had conscious (conscientious) objections

To Court—This he did not say at the meeting

How were his conscientious objections got over? (Objected to Allowed)

It was suggested that the Raj family might contribute something to the Sanitarium Mr Maitra's objection was that he did not know the Kumar and that Kumar did not bear good reputation"

A FREAK OF MEMORY

It is interesting to note that though Mr Maitra deposed that he remembers a man coming with the news of the death of Ramendra Narayan Roy, he had completely forgotten the condolence meeting on the following Sunday He had completely forgotten the fact that he had sung at the meeting In fact, he said, "My mind is a blank with regard to this meeting, yes, perfect blank unaided by the minutes, but I recollect that I did attend some meetings" Mr Maitra, as I have stated before, was a man of culture and a resident of Calcutta, interested in intellectual subjects, whereas Ramendra Narayan Roy was a man of Eastern Bengal, a man who shunned society, judging from Mr Chatterjee's description, he was an unlettered oaf who spent his days with stable boys and his nights with harlots It is obvious that there could have been no community of interest between him and Mr S N Maitra It appears from the evidence that the latter made no note about this particular incident, that he had no interest in Ramendra Narayan Roy before the incident, that he had no reason to suppose that anything strange happened in connection with the reported death of Ramendra Narayan Roy, and that he had no reason to think of this incident again, until many years later It was a matter in which he was not in the least interested The same witness was questioned whether he remembered the time of the day or the circumstances under which the deaths of people in whom he was personally interested

were reported to him, and he said frankly that he did not remember It is obvious, therefore, that the nature of the news given to him was not such that he was bound to remember It is obvious that he was not particularly interested in the person of Ramendra Narayan Roy that he should remember the news, and it is obvious that he had no reason to think of this incident for many years after It has been assumed in the course of the arguments that when a witness of undoubted honesty deposes regarding past events his evidence must necessarily be accurate It is assumed in the argument that a person of Mr Maitra's acknowledged probity would state that he did not remember an incident, if, in fact, he did not remember it accurately But this seems to me contrary to every day experience It frequently happens that people of undoubted honesty, when attempting to reconstruct incidents from the distant past, reconstruct them quite wrongly, and often describe incidents of which they have no knowledge or describe incidents of which they have knowledge in a manner quite the opposite of the truth It is obvious that it was a curious freak of memory that made Mr Maitra remember this particular incident at all, and it does not seem to me to follow necessarily that his memory is reliable

OTHER WITNESSES OF MAITRA GROUP

Three other witnesses deposed in support of Mr Maitra They are Dr Radha Kumud Mukherjee, Hiralal Roy and Nagendra Rakshit Mr. Maitra was examined on the 8th of June, 1934 The next member of this group was not examined until the 22nd of August in that year That witness was Radha Kumud Mukherjee His evidence as to the circumstances under which he deposed and how he came to remember the incident is interesting He deposed that a month before he was examined he understood that he would have to depose, but he apprehended trouble when he read in the "Statesman" Principal Maitra's evidence, and again, he stated that he carefully noted that evidence on account of its possibilities for him The reading of that evidence refreshed his memory on this particular point He added that he took no interest in the Kumar of Bhowal either before or after the incident It appears further that after Mr S N Maitra deposed and before Dr Radha Kumud Mukherjee and Hiralal Roy deposed, the two latter gentlemen met together and discussed the evidence they were about to give It is clear from the evidence of Radha Kumud Mukherjee that he learnt the details of the condolence meeting in his discussion with Hiralal Roy. The evidence of these gentlemen is not, therefore, in my opinion, independent evidence Their memories were refreshed by a perusal, as stated by Radha Kumud Mukherjee, of the evidence given by Mr. S N Maitra Mr S N. Maitra's reputation of strict truthfulness was such that these witnesses would naturally accept his statement without question I do not regard the evidence of these witnesses as adding any value to the evidence of Mr S N Maitra Their evidence is a testimony to their confidence in Mr S N Maitra's truthfulness and adds nothing to the value of his evidence.

HONEST BUT MISTAKEN

As I stated before, there can be no doubt that the evidence of Mr S N Maitra and these other gentlemen has been honestly given. It was easy for them to make a mistake, and in my view, the fact that the incident which they

described was one in which they were not personally interested, makes it all the more probable that they were mistaken in their recollection It happens that there are cogent reasons for holding that these witnesses have made a mistake S. N Maitra deposed that Haran Chandra Chakladar was one of the group of persons present at the Sanitarium when this news was given Haran Chandra Chakladar is a witness as honest and as respectable as any of those in the Maitra group, and he does not support their evidence He has deposed on behalf of the defence and has deposed to the fact that he attended the morning cremation He said nothing whatever about any person giving information of the death of Ramendra Narayan Roy as early as 8 P M on the night of the 8th May Furthermore, when Haran Chandra Chakladar deposed he stated that he shared a room at the Sanitarium with Radha Kumud Mukherjee Haran Chandra Chakladar deposed on commission in March, 1931 Radha Kumud Mukherjee was examined in court in 1934 and he did not contradict the statement Hiralal Roy, another member of the Maitra group, admitted too that Haran Chandra Chakladar was one of their party and admitted further that Haran Chandra Chakladar went to the cremation of Ramendra Narayan Roy, and that he, the witness, knew this fact in May or June, 1909 It is perfectly obvious, therefore, that if anything extraordinary had happened, it must have been known to Haran Chandra Chakladar and also to these members of the Maitra group Yet none of these gentlemen heard of anything extraordinary in connection with the death of Ramendra Narayan Roy None of them heard of an abortive attempt at cremation on the night of the 9th None of them heard of the disappearance of the body from the cremation ground, and none of them heard that a second cremation procession was necessary In fact, so far as they were aware, there was nothing unusual in the death and cremation of Ramendra Narayan Roy If their evidence is accurate, they must have heard of the evening cremation procession and its failure, and of the morning cremation procession The fact that they did not do so seems to me to indicate very clearly that they were mistaken in their present recollection

JUDGE'S WRONG METHOD OF APPROACH

In dealing with this matter the learned trial judge has argued that in view of the evidence of these witnesses and in view also of certain other circumstances, the apparent death of Ramendra Narayan Roy must have occurred at about dusk on May the 8th and, therefore, there must have been an evening cremation In my opinion, this is not the best method of approaching the problem These gentlemen were not interested in Ramendra Narayan Roy They did not go to his cremation They did not do anything as a result of the message which they said they had heard There was no conduct of their own which they might reasonably remember, and they had no reason whatever to keep in mind this particular incident These gentlemen, for the most part, forgot the only part that they themselves took, namely, their attendance at the condolence meeting, and in the case of S N Maitra, the fact that he sang thereat A cremation is a public affair, that of a wealthy man who certainly behaved as an independent prince and, therefore, a person of great consequence would necessarily be accompanied by considerable display When the morning cremation took place, there was admittedly considerable display Armed orderlies went at the head of the procession with arms reversed, crowds collected and the body was taken to the cremation ground with cries of *'haribol'*, *'haribol'*, and coins were scattered In other words, every attempt was made to attract attention, and

we might naturally expect that there would be the same publicity at the time of the evening cremation Such being the case, one might reasonably expect convincing evidence of the fact that an evening cremation took place We have every reason to expect the evidence of persons who saw that cremation and of persons who took part therein In my opinion, the argument should, therefore, be on these lines If an evening cremation is proved to have taken place, it must follow that the evidence of S N Maitra and his companions is not only honest but accurate If, on the other hand, it is shown that no evening procession took place, it must follow that the evidence of these gentlemen is incorrect Because if there was no evening cremation, there was no reason for the fabrication of false evidence as to the time of death, and consequently, no reason for refusing to accept the time given in the obituary notice of May the 10th, the time mentioned in Satyendranath Banerjee's diary written up sometime during May, 1909, or the time given in Dr Calvert's certificate of death given in the month of July, 1909 As will appear later in this judgment, I am satisfied that there was, in fact, no evening cremation, and consequently, I am convinced that the evidence of S N Maitra and his companions, honest though it is, is inaccurate

KALIDAS PAL'S EVIDENCE

In this connection the learned trial judge has referred to the evidence of Kalidas Pal and Madhusudan Mukherjee The evidence of Kalidas Pal is interesting Kalidas Pal deposed on commission for the plaintiff in August, 1931 He stated that he was residing at the old Cutchery Building in May, 1909 and that at about 9 or half past nine one night men on behalf of Ramendra Narayan Roy came and gave the death report and asked for Brahmins to carry the body to the cremation ground He adds that neither he nor his friends were willing to go, and further, that all of his friends stated, "it is absolutely impossible to go to the cremation ground at that hour of night Please come to-morrow" The witness proceeded to say that he did not go on the following day, but that his friends all went on the following day It is obvious from his evidence that when the news was given to them it was too late to go to the cremation at night, that they contemplated that the cremation would be in the morning and that the friends of this witness all went to the morning cremation Yet neither he nor his friends had any reason to believe apparently that there was an attempt at cremation on the evening of May the 8th It seems to me clear that the witness must have been mistaken as to the time when the information was given to him

MADHUSUDAN MUKHERJEE

As regards the evidence of Madhusudan Mukherjee I am of opinion that no reliance can be placed upon it This witness deposed that he was living at Bhutia Busti Villa at Darjeeling at that time and that with him in the Villa were residing Anukul Chatterjee and others The witness states that just a little after dusk he received the news that Ramendra Narayan Roy was dead and his friend Anukul Chatterjee went out at 7 or 7-30 P M Anukul returned sometime during the night, perhaps midnight, or in the early hours of the morning, drenched from head to foot The suggestion is that Anukul had accompanied the evening cremation procession and had been caught in the rain The witness had no conversation with Anukul Chatterjee after he returned

In the first place, it seems to me extraordinary that anybody who had attended a cremation procession and had been driven away from the cremation by storm and rain and had returned to the cremation ground when the rain was over to find that the dead body was missing, should then return home and not take the trouble to narrate to his friends and relatives the details about this unusual and extraordinary occurrence In the case of this witness we have another reason for not accepting his evidence It appears that in July, 1921, shortly after the present plaintiff had appeared and claimed to be Ramendra Narayan Roy, a Sub-Deputy Magistrate came to the witness and questioned him about the events in Darjeeling The witness admits that he was questioned and his statement was taken Unfortunately, the actual statement given by the witness was not available The defence produced what purported to be a copy of that statement Naturally, the witness was not in a position to say whether that copy was, in fact, his statement or not But the following question was put to him "Did you say 'Probably before noon the procession started I don't remember, but one of my friends Anukul Chatterjee since deceased who joined the procession came back to our house probably at dusk or just before dusk'?" Answer "I don't remember I am not prepared to deny it" It seems to me that if the recollection of the witness is correct, he must be in a position to say definitely whether in 1921 he gave to the Sub-Deputy Magistrate a story so completely at variance with the story now given It seems to me that the witness is afraid of denying the original statement made before a Sub-Deputy Magistrate After careful consideration of the whole of his evidence it seems to me that this witness is not a witness of truth These are the only witnesses upon whose evidence the learned trial judge has relied for this part of his finding

ABSENCE OF PRESCRIPTION FROM DUSK TO MIDNIGHT

In dealing generally with the question of death at dusk the learned trial judge has referred more than once to the fact that no prescription appears to have been made by the doctors between the hours of dusk and 11-45 P M, and he seems to have argued that because there was no prescription, the patient must have been apparently dead I must confess that I am unable to understand this line of argument It is perfectly clear from the evidence on record what were the symptoms and what was the condition of Ramendra Narayan Roy in the half a dozen hours preceding his death A number of medical witnesses have been examined by both parties in this case It has not been suggested by a single doctor, so far as I am aware, that any medicine should have been prescribed to deal with those symptoms which was not in fact prescribed It has not been suggested that any prescription other than those made might reasonably have been made to meet with the conditions which the doctors had to face The fact, therefore, that no new prescriptions were made after dusk does not indicate that the patient must have been dead All the materials which the doctors required in dealing with the case were already at their disposal

ALLEGED EVENING CREMATION

We are led, therefore, to consider the evidence regarding the alleged evening cremation The case made out on behalf of the plaintiff is to this effect Ramendra Narayan Roy was taken for dead at about 7 P M At once people were sent to the shops to procure materials necessary for cremation These materials, fuel, ghee, sandal wood etc, were sent to the new cremation ground Thereafter, messages were sent to the Lewis Jubilee Sanitarium, to

the old Cutchery Building, to Bhutia Busti Villa and to other places where Bengalee gentlemen were residing in Darjeeling, calling for assistance in carrying the body to the cremation ground At the same time information was sent to Mahendra Nath Banerjee, the Government Pleader of Darjeeling, and as a result, his wife Kasiswari Devi went to "Step Aside" at 8 or 9 P M to comfort Bibhabati

PLAINTIFF'S VERSION

At about 9 P M Bibhabati, according to the plaintiff's version, was allowed a last look at her husband's body and the body was then carried off in procession to the cremation ground We are not concerned at present with the route taken from "Step Aside" to the Cart Road But from the Cart Road the way lies down Ferndale Road, Conservancy Road, then Victoria Road and at last the old Sudhir Kumari Road down to the old cremation ground Judging from the map of Darjeeling which has been made an exhibit in the case, *Z(350)*, the old cremation ground is situated about five hundred feet below the level of Cart Road The old Sudhir Kumari Road was a narrow difficult road with no buildings on either side at that time, and the old cremation ground was merely a small level area on the steep hillside, far distant from any residence In the year 1907 a new cremation ground had been opened which was situated still further down The approach at that time was by the old Sudhir Kumari Road, passing the old cremation ground and thence by a narrow path to a place about two hundred yards distant from the old cremation ground and about fifty feet lower down the hill At the new cremation ground there was a building and an appropriate structure on which a funeral pyre could be built The old cremation ground had been officially abandoned, but it is not clear that people had ceased completely to use it by the year 1909 On either side of the pathway between the old and the new cremation grounds was situated the vegetable garden of Mr Morgenstern, and his house and some of the buildings were situated at some distance above the old cremation ground It is not clear from the evidence of the plaintiff's witnesses whether a little rain had begun to fall before the party reached the cremation ground or whether it was still fine up to that stage The case is that the party halted at the old cremation ground and commenced to look for a site where they could take the dead body The body had been placed upon a *khat* covered with a sheet, and the sheet had been tied to the *khat* to prevent the body slipping as the party came down the hill The *khat* with the body still on it and the sheet still tied, was placed on the ground, while the funeral party decided on the exact site of the funeral pyre At this critical moment the storm burst and rain came down in torrents All the members of the party fled and took shelter in distant places The storm continued for some considerable time, and not until the sky had cleared and the rain had ceased did the funeral party return to the cremation ground They then discovered that the sheet had been untied and the body removed from the *khat* and taken away They immediately searched in all directions for the body but without success The party finally gave up the search and started back towards "Step Aside"

It is the plaintiff's case that between the time of the abandonment of the search, and 5 or 6 o'clock in the morning some other body was procured by Satyendranath Banerjee and his companions, and this other dead body was carried back to "Step Aside" and kept there in a room downstairs until morning, and this dead body was carried in procession in the day time of May the 9th, was taken to the new cremation ground and there burnt to ashes.

STORY HOW FAR PROBABLE

Before discussing the evidence offered in proof of the evening cremation it seems to me desirable that the story itself be examined with a view to decide how far it can be regarded as a reasonable and probable story It should be remembered that the new cremation ground had been in use since 1907, that is to say, for two years from before this incident The old one had been officially abandoned, but there is evidence to show that it had been used on occasions after 1907 and possibly up to 1909 There was a shed at the new cremation ground, but there was no shed at the old cremation ground According to the evidence on record, the funeral requisites—fuel, ghee, etc,—had been sent to the new cremation ground and not to the old one The shed at the new ground was nearer to the old ground than any other place in which shelter from the rain could be had It has been argued on behalf of the plaintiff that the road between the two cremation grounds had not been made and was virtually impassable There is evidence to show that a hill stream or jhora ran between the two grounds, and there is some evidence on the side of the plaintiff to show that in going from one cremation ground to the other one had to get down into this jhora It has been argued before us that this pathway was perfectly impassable at night At the time when we visited Darjeeling there was nothing to indicate that the jhora constituted an obstruction and there was then no difficulty in passing from the old cremation ground to the new one It may easily be that the road was not in as good a condition in 1909 as it was when we visited But the fact remains that the new cremation ground had been in regular use since 1907 The only approach to the new cremation ground was by the road past the old cremation ground The new cremation ground was in fact used for the morning cremation on May the 9th, 1909, and there is evidence of one witness for the plaintiff that a rickshaw was taken to the new cremation ground on the morning of May the 9th From these circumstances it is obvious that the road to the new cremation ground, though possibly difficult, was by no means impassable even at night It might be reasonably argued that a cremation party taking a dead body at night would have stopped at the first convenient place and carried out the task of burning the body, particularly if the night was fine and the requisites for cremation were available at that spot It is, however, difficult to understand how such a party could choose the old cremation ground with its lack of shelter and lack of ordinary facilities when the weather was threatening, if indeed rain had not actually fallen It is all the more extraordinary when it is remembered that the funeral requisites had been sent (according to the evidence) to the new cremation ground The funeral party consisted, to some extent, of residents of Darjeeling who were familiar with the two cremation grounds and who knew the way to both It is obvious that if the party arrived at the old cremation ground and found none of the materials for cremation at hand, the question would at once arise whether these materials had been sent to the new ground and somebody would be sent to that ground undoubtedly If that had been done, it is surely obvious that the party would have then continued their way to the new ground and carried out the cremation at that place In the circumstances it is difficult to understand why the cremation party should have halted at the old cremation ground as alleged and spent some time there looking round for a convenient site on which to burn the body without any materials for the burning It might of course be argued that this was merely foolishness on their part, and that when people are faced with sudden emergency they do often behave foolishly, and, therefore, this conduct though foolish is not so impossible as to discredit their story

PROCURING OF ANOTHER DEAD BODY

But there are much greater difficulties in the way of acceptance of the plaintiff's account of this night's happenings The latter part of the story is much less easy of acceptance than the earlier part An essential part of this story is that after the funeral party discovered that the dead body was missing and could not be found on search, they set out to produce from some unknown place another dead body and carried it all the way up the hill back to "Step Aside" and placed it in a downstairs room in that house in order that it might be taken out again in procession on the following day The only motive suggested for this extraordinary conduct is that the persons who had taken out the body on the night of May the 8th and who had to abandon the body of Ramendra Narayan Roy became so apprehensive that they would be censured for their conduct on their return to Jaidebpur that they decided to do something to avoid scandal and to avoid rebuke Even if it be granted that such a motive was likely to influence the persons who took part in this occurrence, the alleged conduct seems to me the least satisfactory way of achieving their end They might easily have returned to "Step Aside" and simply stated that they had burnt the body, though they had not done anything of the sort If it can possibly be argued that the people of Jaidebpur would not hear any gossip from Darjeeling or would not hear of the rumours current in Darjeeling, such a story was likely to obtain credence in Jaidebpur On the other hand, if the people in Jaidebpur were likely to hear the rumours current in Darjeeling, no possible conduct on the part of the funeral party could serve to prevent the people in Jaidebpur learning about an abortive attempt at cremation and the abandonment of the dead body A second method by which they might attempt to avoid criticism and censure was to burn the empty *khat* and to report that they had in fact burnt the body It is interesting to note that the story was actually put forward at one time in a pamphlet published by the supporters of the plaintiff in June, 1921 The pamphlet is entitled "Bhowler Katha O Nabin Sannyasi", and in it we find the statement, "When the rain and storm ceased they on coming back to the cremation ground could not find the dead body of the Kumar any more Thereafter it is said they went away setting the empty pyre on fire" If, however, these people felt that the burning of an empty *khat* was not sufficient and that it was essential to burn a body, if a body was available, it is difficult to understand why they should not take the body to the cremation ground that night and burn it at once No useful purpose was served by taking the body back to "Step Aside" By taking the body back to "Step Aside" they were advertising the fact that the first attempt at cremation was unsuccessful They were running the risk of discovery, because it may be safely assumed that the people who did not leave "Step Aside", were not parties at that stage to any proposal to substitute another dead body for that of the missing Ramendra Narayan Roy It has been admitted by the plaintiff's party and it has been proved by evidence which cannot be questioned, that Bibhabati was certainly not a party to any misconduct at that particular time It is admitted further that she had displayed all the ordinary signs of grief It is obvious that if a body was taken back to "Step Aside", some explanation for this extraordinary conduct would have to be offered to her, and the risk would have to be run of her insisting upon seeing again the dead body of her husband Apart from Bibhabati, the other members of the household at "Step Aside" might quite easily have desired to look again on the face of their dead master Such being the case, the risks in taking the dead body back to "Step Aside" were

enormous and no useful purpose would be served thereby It is conceded that there is strong superstition in this country against taking a body back into the house from which it has once been taken out for the purpose of cremation It seems to me, therefore, that the motive for taking a substituted dead body back to "Step Aside" is most unconvincing

ALMOST AN IMPOSSIBILITY

Furthermore, it is to be considered what opportunity these persons had to decide on such a scheme The earliest hour at which the dead body of Ramendra Narayan Roy could have been taken out from "Step Aside" for cremation on the night of the 8th May was 9 P M It is the definite case of the plaintiff's party that Bibhabati was allowed a last look at her husband's dead body at about 9 P M on that night The way from "Step Aside" to the cremation ground was long and difficult It would have taken at least an hour and probably much longer The party could not possibly have reached the cremation ground before 10 or 10-30 P M at the earliest Some time must have elapsed at the cremation ground before they fled The evidence with regard to this incident and with regard to the rescue indicates that the storm which dispersed the funeral party lasted for some considerable time The evidence further shows that these people took shelter at some considerable distance from the cremation ground It is obvious, therefore, that the funeral party could not have returned to the cremation ground after the storm was over much before midnight Then drenched and miserable, these unfortunate people searched on the hillside for the missing body It is obvious that if they were so horrified at their own conduct in abandoning the dead body that they were prepared to contemplate such a serious crime as to procure a dead body of some other person or to disinter a body from some grave, they would not abandon the search for Ramendra Narayan Roy's body until they had done their best to discover it Such being the case, it must have been 1 A M or later before there could be any occasion for them to consider what they were to do in view of the fact that their search for the body was unavailing What could have induced these persons at that hour of the night to imagine that they could get another dead body to substitute in the place of the one they had lost? They were strangers in the locality, and there is no reason to suppose that they knew where the burial ground was situated Dead bodies do not lie about in public places and are not ordinarily available on demand How could these people imagine at that hour of the night that they could at once procure another dead body? and whence could the dead body be obtained? If the dead body was one which was still in the house of his relatives, it could not be imagined that the relatives would abandon the body or allow it to be taken without opposition. If they took a body under such circumstances, the fact would immediately be made known and the object of taking it would be defeated Is it conceivable that these persons would know where the graveyard was to be found? or that they could defile themselves by handling a corpse which they had disinterred from a grave merely for the purpose of avoiding censure and rebuke on their return to Jaidebpur? It seems to me that the whole story bristles with improbabilities, and the story is so nearly impossible that it could not be believed except on absolutely unimpeachable evidence

ALLEGED RAIN AND STORM

It is obvious from the plaintiff's account that one of the most important questions in this case is whether or not there was any rain at the cremation ground on the night of May the 8th It happens that Darjeeling is rather unusually well provided with centres at which there are rain gauges and at which records are kept At St Paul's School which is situated about three quarters of a mile to the south east of the old cremation ground, there was a rain gauge from which the figures for the Government records were taken At St Josephs' College which is situated about 1½ miles to the north of the old cremation ground was another rain gauge which was read by one of the Fathers in that College who was a student of Meteorology and who kept records of the rainfall In addition, records were kept at the Municipal Office which is about half a mile distant from the cremation ground in a direction to the north and east therefrom A fourth record was kept at the Lloyd Botanical Gardens which was in a north-easterly direction from the old cremation ground It happens also that Dr B B Sarkar whose diary has been proved in this case made a note each day in the diary regarding the weather Dr B B Sarkar lived in a house on Cart Road almost due east of the cremation ground

GOVERNMENT WEATHER REPORTS

The materials available from all these sources do show what was the weather at Darjeeling on May the 8th and the days before and after At that time Darjeeling was included in Bihar for the purpose of the Government weather report As appears from *Ex Z(329)*, the Government weather report for the 24 hours ending 8 A M on Saturday May the 8th shows that in "*Bengal*—Practically there is no cloud Mean temperature is in excess and the humidity—rather variable *Bihar*—The sky is practically free from cloud Day temperatures are in large excess (Bhagalpur maximum 110 degrees) The air is much drier than usual at most stations", and under the head *General* appears the phrase, "There has been practically no rain except in Assam, where further local falls may occur before to-morrow" The record shows that at Darjeeling the rainfall was nil, the barometer was rising and the temperature was 6 3° in excess of normal for that day

On the following day, that is, for the 24 hours ending 8 A M on the 9th of May, the Government record shows "*Bengal*—The sky is clear Mean temperature is in excess and the humidity is lower than usual *Bihar*—The sky is free from cloud Day temperatures are in considerable excess, although the night temperature at most stations is below normal The air is very dry" Under the head *General* appears the remark, "Local rain fell in Assam yesterday Elsewhere the sky is clear or slightly-clouded and the west winds in Bihar are responsible for very dry weather over that division" The figures for Darjeeling show that rainfall was nil, the barometer was still rising, the temperature was still rising, the temperature was 7 2° in excess of normal, and there was a rise in maximum temperature compared with the previous day by one degree

For the 24 hours ending 8 A M on Monday, the 10th of May, the record shows "*Bengal*—Clear or lightly clouded skies are reported Mean temperature is in excess by 4 to 8 degrees The air is drier than usual *Bihar*—The sky is clear except towards the east where it is moderately clouded Dry temperatures are in large excess The air at most stations contains less moisture than

usual," and under the head *General* there is the remark, "Assam reports rain at several stations More may possibly be there before to-morrow Conditions similar to yesterday are likely to hold over the two Provinces, and the humidity, already below normal, may decrease still further" The figures for Darjeeling show that the rainfall was nil, the barometer was still rising and the maximum temperature was 5 6 degrees in excess of normal, the maximum day temperature was 5 degrees less than the maximum recorded on the previous day

For the 24 hours ending 8 A M on Tuesday, the 11th of May, the record shows "*Bengal*—Clear or slightly clouded sky is reported Both day and night temperatures are in excess and the humidity is rather variable *Bihar*—The sky is clear except at Darjeeling where it is overcast Mean temperature is in excess and the air is much drier than usual towards the west" Under the head *General* appears the remark, "Rain was fairly general in Assam yesterday and more is possible to-day Rain is also not unlikely in Eastern Bengal and on the Orissa coast" The figures for Darjeeling show that the rainfall was nil, the barometer had fallen slightly, the maximum temperature was still 3 5 degrees in excess of normal but 2 degrees lower than that recorded on the previous day

ST JOSEPHS' AND ST PAUL'S REGISTERS

The St Josephs' Register is *Ex Z(148)* The method of maintaining the register at St Josephs' was different from that observed at St Paul's The same period, namely, 8 A M to 8 A M was chosen for the purpose of keeping a record, but the record under the head of any particular date at St Josephs' represents rainfall from 8 A M on that particular day to 8 A M on the following day, whereas the record at St Paul's under a particular date refers to the rain from 8 A M of the previous day to 8 A M on the day on which it is recorded, that is to say, if we take May the 8th, as an example, if any rain is shown in the St Josephs' record under the date May the 8th, that rain will have fallen between 8 A M on May the 8th and 8 A M on May the 9th whereas if rain is shown in the St Pauls' record under date May the 8th, that rain must have fallen between 8 A M of May the 7th and 8 A M of May the 8th If this difference in the method of recording the readings is borne in mind, the apparent differences between the records can easily be explained The St Josephs' record is *Ex Z(148)* That record shows rain under date May the 1st, May the 2nd and May the 3rd, no rain under dates May the 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th, and then rain on May the 12th and successive days The maximum temperature at St Josephs' increased steadily from May the 1st up to May the 8th, and then fell steadily until May the 15th

MUNICIPAL RECORD TAMPERED

The Municipal records unfortunately have no value for us in this suit The defendants obtained a certified copy of the Municipal record, and that certified copy showed rain on May the 1st, 2nd and 3rd, no rain between May the 4th and May the 12th, and then rain again on May the 13th and subsequent days After the defendants had obtained their copy, the plaintiff applied for and obtained a certified copy of the same register When their copy was prepared, it was discovered that the entry after May the 3rd had been tampered with, that the figure representing the date had been scratched

out, and had then been overwritten, that a line had been struck through it and the figure 13 had been written over it The plaintiff contended that the original figure was some figure other than 13, and that this register was tampered with by somebody on behalf of the defendants who had attempted to make the original figure look like 13, and having failed, had crossed out the entry and written "13" above it The defendants, on the other hand, contend that the original figure was 13, and that somebody on behalf of the plaintiff tampered with the record and tried to erase the figure 13 and substitute the figure 8 in its place When he failed to do so in such a manner that suspicion could possibly be averted, he crossed it out and wrote 13 on the top in order to convey the impression that the record had been tampered with by somebody on behalf of the defendants Arguments have been placed before us by both the learned counsel, each suggesting that the record must have been tampered with by somebody on behalf of the other party There are arguments in support of both the versions, but it seems to me impossible to say with any certainty what the original entry was or at whose instance the record was tampered with This record, therefore, must be ignored, and no inference can be drawn from it

BOTANICAL GARDENS REGISTER

The Botanical Gardens register is *Ex Z(207)* The register shows that there was rain on May the 1st, 2nd, 3rd and 4th, no rain from May the 5th to May the 13th, and rain on May the 13th and subsequent days The learned counsel for the plaintiff has argued that no reliance should be placed on the Botanical Gardens register in view of the evidence as to the manner in which that register was kept

The register was produced by Bahadur Singh, a Chaprasi of the Botanical Gardens Summonses had been served upon the officer in charge of the Gardens to produce the document, and he had sent the same through Bahadur Singh to the court Bahadur Singh deposed that readings were sometimes taken in a slip by the Sahib, if he happened to be absent from the Gardens He would subsequently enter the figures on the slip in the book The evidence of this witness and the record shows that the Botanical Gardens record was rather carelessly kept and it cannot be held to be conclusive But it is, at all events, significant that this record shows no indication of any rain on May the 8th or 9th, and however carelessly the record was kept, it was kept at a time when no dispute had arisen regarding this particular period.

DR B B SARKAR'S DIARY

In the diary of Dr B B Sarkar, *Ex Z(215)*, we find that for May the 8th and May the 9th he noted that the weather was bright On May the 10th there was slight drizzling

The entries in the records, therefore, show that there was no rain at any of these various places in Darjeeling on May the 8th or May the 9th We have still another record which is relevant for the purpose of the present enquiry, and that is the extract from the supplement to the Calcutta Gazette which is *Ex Z(246)* It shows no rain at Siliguri between May the 6th and May the 12th, no rain at Darjeeling between May the 5th and May the 12th, no rain at Kalimpong between May the 5th and May the 10th, no rain at

Mongpoo between May the 5th and May the 13th, no rain at Kurseong between May the 6th and May the 12th, and no rain at Pedong on May the 8th, 9th and 10th In other words, according to this record in a number of stations clustering round Darjeeling no rain was recorded on May the 8th, 9th and 10th

All these records show a steadily rising barometer, and a wind from the north, east or north-east

FATHER PEEL'S EVIDENCE

The defendants examined Father Peel, one of the masters of St Josephs' College, who was a student of meteorology and who had studied meteorological conditions in Darjeeling for many years past Father Peel deposed that the meteorological records of that period indicated that the monsoon had not set in at Darjeeling and that pre-monsoon conditions were then prevailing He said that his experience based on observations from 1916 onwards was that when rain occurs in Darjeeling during the prevalence of pre-monsoon conditions, that rain will certainly be recorded either at St Josephs' or at St Paul's There may be rain at St Josephs' and not at St Paul's, there may be rain at St Paul's and not at St Josephs', but if no rain is recorded at either place, it is almost certain, according to this witness, that no rain fell in Darjeeling during that period The witness has further stated that in consideration of the details given in the Meteorological Chart and in view of the figures to which I have referred above, it is clear that there was a spell of dry weather between May the 7th and May the 9th, and that no rain fell at Darjeeling We have been asked to reject the evidence of this witness on the ground that weather prediction is notoriously uncertain This argument omits to notice that Father Peel's evidence was not wholly weather prediction He gave his opinion as to the conditions that prevailed from a consideration of the recorded figures and the Government Chart both before and after the date in question In other words, he interpreted the data which the Meteorological authorities were in a position to provide It is one thing to predict from present conditions what the future is likely to be, but it is a totally different thing to state from a consideration of the conditions all round a particular place before, during and after a specified time what must have happened at that particular place at the specified time It seems to me unreasonable to reject Father Peel's evidence in toto It seems to me that his evidence taken with the materials derived from the records at St Josephs' and St Paul's and confirmed by the Botanical Gardens record and by Dr Sarkar's diary indicates that there was probably no rain at Darjeeling on May the 8th, and there was certainly not a heavy storm which spread all over Darjeeling, and reached Lebong, as some of the witnesses say

In support of his conclusion that there might easily be rain at the old cremation ground in spite of the fact that all the records available show that there was no rain in Darjeeling at that time, the learned trial judge has referred to the evidence of witnesses like Dr MacGilchrist, Dr Calvert and Mr Rankin to show that it is a common occurrence for rain to fall at one place in Darjeeling at a time when it is fine at another place Such a phenomenon is not uncommon in other places also But we are not now concerned with the simple question as to whether rain had fallen at one moment at one place, while it was fine in another It often happens that a storm passes over one spot before it reaches another spot The problem before us is not whether rain might have fallen at one place when it was fine in neighbouring places The problem is whether it was possible that a

violent storm could come up the valley from the west or the south-west and deposit rain with such violence at the cremation ground as to drive away the funeral party in utter confusion, and yet that not a drop of rain and not a trace of storm should reach any point 500 yards beyond that cremation ground The places for which we have records showing complete absence of rain are St Josephs' to the north, the Botanical Gardens to the north-east, Dr Sarkar to the east and St Paul's School to the south-east In other words, a line of observation posts shows that no rain reached a spot half a mile beyond the east of the cremation ground It seems to me incredible that a storm so violent as is described by the plaintiff's witnesses should come to a sudden termination before it proceeded half a mile beyond the cremation ground

The learned judge in his judgment has a remarkable passage at page 376 of the paper book He says, "I find, however, as much as 2 41 inches of rain on the 5th, 4 98 inches on the 6th, 5 77 inches on the 7th, 3 36 inches on the 8th, 1 17 inches on the 9th May, 0 21 on the 10th, 0 79 on the 11th, 2 10 on the 12th May in Jalpaiguri District which is at the foot of the Himalayas, and must include the valleys near Darjeeling, and certainly Siliguri It looks *kalbaisakhi* (Baisakh rainstorm) indeed with wind towards the North" I have not been able to discover from what source the learned trial judge obtained these figures It may be that the figures have been obtained from some Gazette But even if that is so, the argument is fallacious The learned trial judge seems to have overlooked the fact that in a Gazette if rainfall is recorded at Jalpaiguri, it does not mean that the rain has fallen in equal amount over the whole of Jalpaiguri District Jalpaiguri town, where I presume the rain gauge was, was situated at a considerable distance from Darjeeling, and rain at Jalpaiguri town does not indicate rain all over Jalpaiguri District and certainly does not indicate rain at Siliguri or any place near Darjeeling As I have pointed out above, the Gazette records show that there was no rain at Siliguri between May the 6th and May the 12th The deduction, therefore, made by the learned judge from the figures for Jalpaiguri that there must have been rain at Siliguri and possibly also in the foothills near Darjeeling is contrary to the evidence and is wholly unjustified

FAKIR ROY'S EVIDENCE

The learned trial judge relied upon one other piece of evidence in arriving at this conclusion The evidence referred to is the evidence of a witness named Fakir Roy Fakir Roy is a witness who was examined by the defendants on commission in October, 1932 This witness had been cited as a witness for the plaintiff, and one of the witnesses for the plaintiff had stated that this witness had taken part in the evening cremation procession Thereupon the defendants had questioned the witness and obtained from him a statement showing clearly that he had not taken part in the evening cremation They, accordingly, summoned this witness in order to prove that he had not done so They examined him, and he deposed in favour of the defendants and stated definitely that he had never gone to the cremation ground for burning the dead body of the second Kumar of Bhowal In cross-examination this witness was asked "Do you remember your having had any talk with Anukul Chatterjee about the Kumar of Bhowal before your seeing the procession of which you spoke? (Objected to)" Answer — "Whether it was before or after—that I do not remember, but that Anukul Babu told me that he went to burn the Kumar the night before For that

reason he felt pain in hands and feet and all over his body I think Anukul Babu told me this" Again, he stated "There were rain and storm at Darjeeling in the evening just preceding the day on which the procession, of which I spoke, was held" Question "Whether there were storm and rain at night? (Objected to)" Answer "Methinks, there were rain and storm from dusk till 9 P M at night" Then says, "I think it was just like the *Kal Baisakhi* (rain and storm occurring in the month of Baisakh), in our part of the country" The witness was re-examined by the defendants' advocate The re-examination was in fact cross-examination designed to show that the witness was an untruthful witness In his re-examination he gave the following evidence "Did Anukul Babu say that the body of the Kumar was burnt after it had been taken to the cremation ground? (Objected to)" "He said that he went to cremate the dead body, but he did not tell whether he did cremate it or not" "Did he tell you anything of the sort that the body was left on account of rains and storm? (Objected to)" "No, he did not say anything of the sort" "Did he tell anything of the sort that the dead body could not be burnt? (Objected to)" "No, I did not hear anything of the sort" "Did Anukul Babu tell you anything about the exact time when he started with the dead body from the "Step Aside"? (Objected to)" "I do not remember" "You said that a Deputy Magistrate took down your statement, and you stated further that you enquired of the Deputy Magistrate why he took down your statement What did you come to know?" "Taking down my statement, he said that if my evidence was required, I would have to give it" "Did you tell the Deputy Magistrate about your interview and talk with Kasiswari Devi which you stated in your deposition before the Commissioner? (Objected to)" "Yes, I did" "You spoke of *Kal Baisakhi* in your cross-examination In which month or months does the *Kal Baisakhi* take place?" "From the end of March to the 1st week of May" "When there is rain and storm of *Kal Baisakhi*, does it take place all over Darjeeling? (Objected to)" "Yes, it takes place all over Darjeeling" "Because the death of the Kumar took place during the *Kal Baisakhi* time, you said that there was rain and storm from the evening till 9 o'clock at night on the night preceding the day of the procession, or after such a long time you clearly remember that rains and storm did actually take place on the night preceding the day of the procession? (Objected to)" "I have no recollection Because it was the season of *Kal Baisakhi*, you said that there might have been rains and storm on the night preceding the day of the procession? (Objected to)" "Yes, it was because it was the season of *Kal Baisakhi*" It is obvious from the evidence of this witness that he had no clear recollection whether there was rain on the night of May the 8th or not The re-examination may be open to criticism But it does, in my opinion, shew that the witness is utterly unreliable and untruthful If this is an untruthful witness, as seems to be the case, it should be remembered that he was first approached by the plaintiff's men, and his statement in cross-examination is as likely to be the result of suggestions from them as his statement in re-examination is likely to be the result of suggestions from the defence counsel It seems to me that the evidence of this witness is certainly not so convincing and so reliable as to justify the court in drawing an inference contrary to the inference suggested by all the contemporaneous independent evidence

CONCLUSION NO HEAVY RAIN AND STORM

In my opinion, it cannot be stated with certainty that not even a shower fell on the cremation ground, but it can be said with fair certainty that

there was no such heavy storm at Darjeeling on that night as would drive the funeral party away and compel them to abandon the body

It should be remembered in this connection that the old cremation ground was at a considerable distance from any human habitation The members of the household of Ramendra Narayan Roy were strangers to Darjeeling They could not know the neighbourhood in which the cremation ground was situated They went there at night, according to the plaintiff's case, when the sky was overcast, if it was not actually raining They went down a deserted hillside at dead of night, along a difficult path where there was no sign of habitation near about There was no question, therefore, of their withdrawing a few yards from the cremation ground to take shelter while the storm passed If they fled, it meant they fled to a considerable distance leaving the body It seems to me extremely unlikely that anything short of a very violent storm could compel them to behave in this way This evidence regarding rainfall at Darjeeling is a strong indication, therefore, that the plaintiff's story of the evening cremation cannot possibly be true

ORAL EVIDENCE ON PLAINTIFF'S SIDE

The plaintiff examined 28 witnesses in all to prove that the evening procession actually took place The evidence of these witnesses has been examined with great care and has been criticised by the learned advocate for the defendants on many grounds It is obvious that when witnesses depose after such a lapse of time as in this case, discrepancies in details and as regards the actual time at which the incidents occurred have no particular meaning The witnesses had no reason to remember the incident for 10 or 12 years after it occurred It was not until the plaintiff arrived in Dacca in 1921 and there was considerable excitement regarding his claim to be Ramendra Narayan Roy that the witnesses to the incidents in Darjeeling had any occasion to think of those incidents and to decide exactly what happened In the circumstances, even the grossest contradictions in detail would not be sufficient to discredit the witnesses

HOW TO TEST SUCH EVIDENCE

On the other hand, it is not possible to check the evidence of witnesses by ascertaining to what extent they agreed with each other There can be no doubt that in this case false witnesses have been procured and false evidence has been given on one side or the other, if not on both sides The only way in which we can check the evidence of these witnesses is to consider whether they are the persons who would be likely to take part in such a funeral procession, whether their alleged conduct at the time is natural or probable conduct, whether their alleged subsequent conduct is reasonable and natural conduct, and whether the manner in which their evidence has been obtained is straightforward and above board

BELATED DISCOVERY OF THE WITNESSES

When the plaintiff presented his memorial to the Board of Revenue in December, 1926, he stated that Mr Dwarka Nath Chakravarty had been

pleased to hold an enquiry into the matter extending over two years, and Mr Dwarka Nath Chakravarty had examined the gentlemen marked with asterisks in the following list and many others including persons who were with the Kumar at Darjeeling and who attended the funeral We have also a definite statement in a letter written over the signature of Rani Satyabhama Devi to J G Drummond, Collector of Dacca, on the 29th of July, 1922 to the effect that "Babu Surendra Nath Mukherjee, B L, an educated and a respectable gentleman of Dacca, had gone to Darjeeling and made enquiries about the alleged cremation" It is clear, therefore, that in 1921 or 1922 enquiries had been made at Darjeeling, and if the statements in this document are to be believed, evidence had been procured regarding the alleged cremation of Ramendra Narayan Roy We have every right to expect, therefore, that the witnesses examined on those occasions should be produced before us and their evidence offered to us for our assistance We find, however, that with one or two notable exceptions, all the witnesses examined on behalf of the plaintiff in the present case to prove his story of the evening cremation have been procured within a month or two before their evidence was recorded, with the exception of one or two, the remaining witnesses were not discovered by Mr Surendra Nath Mukherjee, nor was their evidence placed before Mr Dwarka Nath Chakravarty before 1926

OTHER FEATURES OF THE EVIDENCE

Another striking feature of the evidence is that none of the witnesses assert that any of the friends and relatives of Satyendranath Banerjee or any other member of the Darjeeling party attended the evening cremation It is an admitted fact that Shyamadas Banerjee is a close relative of Satyendra Nath Banerjee, brother-in-law of Ramendra Narayan Roy, and that Shyamadas Banerjee was residing at the time in the old Cutchery Building at Darjeeling It is admitted that Rajendra Nath Sett was a great friend of Satyendranath Banerjee and was residing at the time in the Lewis Jubilee Sanitarium It is admitted that these two gentlemen received a call to assist at the cremation and that they went to the morning cremation It is not even suggested that they went to any cremation procession on the evening of May the 8th Again, it is admitted that the sons of M N Banerjee, Government Pleader of Darjeeling, were boys who were accustomed to assist strangers in difficulties and who frequently assisted on such occasions as cremations It is admitted that Kasiswari Devi, the wife of M N Banerjee, was a lady who was always ready to help any Bengalee who was in difficulty at Darjeeling Her generosity and sympathy was so well known that it has been conceded in this case that she would certainly have gone to the assistance of Bibhabati as soon as the news of the death of Ramendra Narayan Roy reached her ears It is, therefore, almost certain that the sons of M N Banerjee would have rendered assistance at the cremation of Ramendra Narayan Roy, if they were free to do so There is evidence on the side of the defendants that one at least of these sons assisted at the morning cremation This evidence has been questioned and contradicted by other witnesses examined on behalf of the plaintiff, but nobody so far as I am aware has suggested that these sons of M N Banerjee rendered any assistance on the occasion of the evening cremation

One of the striking features in the evidence in this case is that nobody asserts that the people who would naturally have assisted on the occasion of the cremation of Ramendra Narayan Roy Chowdhury took part in the

evening procession Furthermore, with the exception of two or three witnesses, those who deposed that they attended the evening procession were not personally invited to do so They were people who joined the procession either out of curiosity or sympathy without any personal interest in the matter Mr Chatterjee on behalf of the plaintiff has argued that the people of Eastern Bengal have such a passion for cremations that they are eager to join any cremation procession that they may see, whether the persons whose body is to be cremated is known to them or not It seems to me that if there were any truth whatever in this assertion, it would still be difficult to believe that such enthusiasm would not be chilled on a cold Darjeeling night at 10 P M when rain was either threatening or already falling, and the cremation ground was situated at a considerable distance along a difficult road

The learned trial judge has not discussed in any detail the evidence of the witnesses who deposed to the evening cremation Beyond stating that two of the witnesses are persons of repute upon whom reliance could be placed, he contents himself with giving a list of the other witnesses who deposed to the procession, and remarks "I do not propose to go through the evidence in detail They would not be believed if death at dusk was not a fact, and if that was a fact, there would be no reason to disbelieve them" I propose to refer briefly to the evidence of these witnesses, and it will be apparent from that reference that the learned trial judge's reluctance to place any reliance on their statements was perfectly justified

PADMINI MOHAN NEOGY

The witness on whom the learned judge chiefly relies is one Padmini Mohan Neogy This gentleman was a sub-editor of the "Bengalee" who was on leave at Darjeeling and was staying at Lewis Jubilee Sanitarium He deposed that one day at dusk a man came and said that the Kumar of Bhowal was dead and that men were wanted to help in the cremation He stated that he was one of 7 or 8 who thereafter went to "Step Aside" with him to assist It is interesting to note that nobody else from the Sanitarium has been examined as a witness, and none of those 7 or 8 who went from the Sanitarium has been named The witness proceeded to state that when he reached "Step Aside", he found the dead body on a *charpoi* downstairs Immediately after their arrival the procession started with the body to the cremation ground The witness himself left the cremation ground as soon as the party had arrived there with the body, apparently because the weather was threatening He returned to the Sanitarium and no rain fell during his return journey He stated that the rain came a little after "we reached the Sanitarium, how long after I cannot say"

"*Q*—Give us an idea

A—Within an hour

Q—Would you try to be more approximate?

A—I remember the rain commenced before I went to bed"

If this witness's evidence is to be believed, the party taking the body to the cremation ground arrived there at night, half an hour or an hour at least before there was any rain In other words, they had time to make the pyre, place the body thereon and set fire to it It is obvious that people

would not waste time over such a melancholy business in the middle of the night, and it is obvious that they could not have wasted half an hour at the burning ghat without setting fire to the dead body In other words, if the evidence of Padmini Mohan Neogy were accurate, fire would, in fact, have been set to the body before the rain came down The reason this witness gives for attending the funeral at that hour of the night is also singularly unconvincing The witness is a Kayastha by caste and he realised that Brahmins were necessary for carrying the dead body He stated "I did not probably ask who the bier-bearers were I was not a Brahmin, but still went as I understood that *bhadralogues* would do, as enough Brahmins might not be available, and also because I expected a grand feast, the deceased being a big man" This explanation is singularly unconvincing Even had the witness thought that the services of non-Brahmins would be required if the number of Brahmins was insufficient, he must have realised long before the procession reached the cremation ground that the services of non-Brahmins would not, in fact, be required Further, his statement that he went because he expected a grand feast seems to me merely ridiculous, in view of the further remark that he did not enquire whether any such feast was held But the thing that convinces me above everything else that the story of this witness cannot be true is the fact that he did not hear at any stage thereafter that the body was not cremated He deposed as follows "I stayed on at Darjeeling for 10 or 12 days after the incident I had no reason to believe during these days that the Kumar had not been cremated Nor any reason to believe that he had not been dead I did not come to know of any funeral procession the next morning of the second Kumar of Bhowal" I am unable to believe that a newspaper man living in a building in which there were people who resided and took part in the morning cremation would be unaware of such a strange incident as that deposed to by the witnesses to the evening cremation If, in fact, the body had disappeared and the relatives had been compelled to have a second procession on the following morning, this fact would have been known to all the Bengalee gentlemen in Darjeeling and would not have escaped the knowledge of the sub-editor of a newspaper I am satisfied that the evidence of this gentleman cannot be accepted

OTHER WITNESSES OF PLAINTIFF

The other witnesses examined on behalf of the plaintiff, who deposed to the fact that they took part in the evening cremation procession are

Sitanta Kumar Bagchi,
Kiran Mustaphi,
Biseswar Mukherjee,
Jatindra Chandra Chakravarty,
Indra Shing Satri,
Chandra Singh,
Manmatha Nath Choudhury

In addition to these, six witnesses have deposed to the purchase of fuel for the purpose of cremation on the night of May the 8th They are

Durgaprasad Baishy,
Laksmi Chand,
Mahammad Ashraf Alam,
Kedar Nath Pande,
Bhakatbir Roy,
Jangbir Sinha Karky

A number of other witnesses have deposed that they saw the evening procession but did not accompany it. They are:

Ranjit Singh,
Dhanjit,
Lal Chand Panwala,
Santa Bir Shing,
Bhangi Rauth,
Nasiruddin Ahammed,
Mahammad Abdul Suttar

Another group of witnesses have deposed that they heard of the evening procession, but they did not actually see the procession or join in it. They are

Surendra Chandra Roy Chowdhury,
Giris Chandra Ghose,
Aswini Kumar Sen,
Madhusudan Mukherjee
Jnanendra Nath Banerjee,
Sailendra Kumar Kusari,
Matilal Ganguli,
Sushila Sundari Devi,
Mohammad Ali Hossain.

Still another witness, Jadu Lal Mullick, heard of the death of Ramendra Narayan Roy on the night of May the 8th He did not even hear of the funeral procession

Throughout the judgment, particularly in dealing with the evidence of the witnesses examined on behalf of the plaintiff, the learned trial judge has referred to their standing in society and to their respectability as a ground for accepting the evidence of witnesses Unfortunately, in this case the mere fact that a man is a person of position and of independent means is not a sufficient ground for accepting his evidence. Many persons who are of this description have been examined on both sides, and many of them must have given false evidence The evidence of all witnesses, whatever their position, requires examination before it can be accepted as being either truthful or accurate A typical example of the nature of the evidence given with regard to the evening cremation is the evidence of a group of witnesses who all happen to be related to each other They are. Jatindra Chandra Chakravarty, Sailendra Kumar Kusari, Matilal Ganguly and Sushila Sundari Devi

JATINDRA CHANDRA CHAKRAVARTY'S GROUP

Jatindra Chandra Chakravarty had two brothers Basanta Kumar Chakravarty and Bejoy Chandra Chakravarty Their sister was Sushila Sundari Devi who is the mother of Sailendra Kumar Kusari.

Matilal Ganguly is a connection by marriage of Jatindra Chandra Chakravarty

The story is that two persons came to the house of Raj Kumar Kusari with the news of the death of Ramendra Narayan Roy. Basanta Kumar Chakravarty and Bejoy Chandra Chakravarty were then living in that house Jatindra Chandra Chakravarty and Basanta Kumar Chakravarty on receipt of

the news set out for "Step Aside" to assist in the cremation, and in fact, went with the cremation procession to the cremation ground When the rain came they fled and took refuge in the slaughter house near at hand When the rain subsided, they returned to the cremation ground and found that the body was missing They then went home and told the other persons in the house what had happened Sailendra Kumar Kusari saw them on their return and found they were soaked to the skin, and heard about their experiences at night Matilal Ganguly deposed that he was informed of the death of Ramendra Narayan Roy at 7-30 or 8 o'clock that night, but that he did not go to assist in the cremation, because he was not in the habit of so doing On the following day he heard what had happened

It is curious that in the year 1921 the defendants during the course of their enquiry obtained statements from Bejoy Chandra Chakravarty, one of the brothers of Jatindra Chandra Chakravarty, and also from Matilal Ganguly It is not disputed that Bejoy Chandra Chakravarty gave a statement, and the statement produced by the defendants as his statement shows, if true, that he was absolutely ignorant about any cremation at night It is curious that he should now be the person who did not attend the cremation ceremony, and that his two brothers should have gone and left him in entire ignorance Sailendra Kumar Kusari was then a boy of 12 or 13 It is strange that he should remember the occurrence as he now pretends to

Matilal Ganguly was examined by Hiranlal Mukherjee, Deputy Magistrate, on the 3rd of July, 1921 He now states that he was ill, if not unconscious, at the time when he was examined, and that he does not remember what statement he made But inspite of his lapse of memory, he still maintains that whatever he said to Hiranlal Mukherjee was truth His statement to Hiranlal Mukherjee is as follows (*Ex Z 252*)

> "I was in Darjeeling in May, 1919 I only heard of the death of the second Kumar of Bhowal I did not know his name I was not present at the death or with the funeral procession or at the cremation of the Kumar While the Kumar was in Rockwood some years before, I went with other boys to collect subscription for our football club We waited outside and saw a fat man sitting on a couch inside the room One of the boys told us, he was the Kumar I did not mark his features at all as I was very young I cannot say when the funeral procession started, or when the cremation ended, or what cremation ground was used, or which route was followed by the procession I cannot say whether there was any rain or storm during the procession or the cremation I do not know when the cremation took place, or if there was any rain or storm on the previous night I have no knowledge as to the persons who were present either at the death or with the funeral procession or at the cremation I have no knowledge whatsoever of any facts connected with the illness, death or cremation of the Kumar I only heard of the death, that is all"

The statement contradicts his present evidence in toto, and if that statement was honestly made, it proves that his present evidence is wholly unreliable As I have said, Matilal Ganguly admitted in his cross-examination that he had made a statement to Hiranlal Mukherjee, and the only explanation he offered was that he was so ill at the time that he did not know what he said It is interesting in this connection to read the cross-examination of Hiranlal Mukherjee It reads *"Question*—At the time you recorded the statement had you any suspicion that the people looking after the defendants' affairs

were making one person personate another? *Answer*—I don't understand I had no suspicion that they were palming off some body on me as Matilal Ganguly *Question*—I put it to you that on looking at the, signature on *Ex Z* (252) you cannot but realise that it is not the signature of Matilal Ganguly *Answer*—Matilal Ganguly signed it in my presence The signature here reads M L Ganguly I did not scrutinise the signature after it was written in my presence *Question*—You realise you were too young in 1921 to protect yourself against defendants' agents? *Answer*—No answer *Re-examination*—I knew Matilal very well when I recorded his statement. He was an assistant under me"

In view of the fact that Matilal Ganguly had already admitted that he had been examined by Hiranlal Mukherjee and in view of the fact that Matilal Ganguli was an assistant in the office under the control of Hiranlal Mukherjee, a more reckless and unprincipled cross-examination it is difficult to imagine

Sushila Sundari Devi in cross-examination stated

> "I heard the next day of a funeral procession of the Kumar, but then it was faked, I heard, as the body was a body taken from the Victoria Hospital All this I heard The body was a dead body, I heard
>
> *Q*—You heard this on the day following the night on which your brothers returned from *sasan*—did you?
>
> *A*—I heard it next morning This too was in everybody's mouth at Darjeeling"

In view of the fact that no body else pretends that the story of a substituted body being burnt was current at Darjeeling on May the 9th and in view of the fact that the plaintiff's party have now abandoned the false story of a body being taken from the Victoria Hospital, it seems to me clear that this lady is rather reckless in her untruths

PROCURED EVIDENCE

Jatindra Chandra Chakravarty, the only one of the party who pretends that he joined the procession, deposed as follows "On the day I heard the second Kumar had been cremated, I heard his body had been carried to the *sasan* I heard that day that the body was taken with a procession from chowrasta, and I thought, though I did not hear it, that it was coming from the "Step Aside" I did not enquire how the corpse could come to the "Step Aside" or to the chowrasta I did not enquire where the corpse was found Nor when found or by whom I did not enquire I did not enquire how it disappeared, as this fact I knew", and later in cross-examination he states "In 1921 I heard the Kumar had come back, I was at Darjeeling I did not discuss the matter with other people as all had read the papers I did not tell anybody that I had gone to cremate the Kumar, as I dared not talk about matters offending a Raja, but the inmates of my house knew of course" It seems to me that the latter explanation is merely silly, and his statement that he made no enquiries is so unnatural that it suggests strongly that he had never heard that the body was missing It is interesting to note that this witness is one of two witnesses who assert that he took shelter during the storm in a slaughter house which did not exist It is clear from this evidence that this group of witnesses has been procured by the plaintiff's men and that their evidence has no value whatever

FALSE STORY OF SHELTERS

There has been cross-examination of the witnesses regarding their conduct when the rain storm occurred at the cremation ground on the night of May the 8th, and particularly with regard to the place wherein they are supposed to have taken shelter during the height of the storm To appreciate this evidence it is necessary to bear in mind the physical features of the locality near the cremation ground In approaching the old cremation ground in 1909 a large part of the journey was along the old Sudhir Kumari Road On the top of that road, that is, the end of the old Sudhir Kumari Road furthest from the cremation ground, another road or road track branched off in a northwesternly direction to the site of the old slaughter house The present Mahomedan burial ground is near the site of the old slaughter house Starting from the angle between the track leading to the site of the old slaughter house and the old Sudhir Kumari Road, there commences a deep ravine which winds down the hill towards the west and ultimately joins the Bryngwyn Jhora If, therefore, any one on the site of the old cremation ground desired to go to the old slaughter house, he would either have to descend into the deep ravine and climb up the other side in order to reach the slaughter house, or else, go up the hill the whole length of the old Sudhir Kumari Road until he reached the junction with the slaughter house road, and then go down the hill again From the top of the old Sudhir Kumari Road to the site of the old cremation ground there is now only one building on the side of the road That building is the new slaughter house, and it is to the south of the old Sudhir Kumari Road, that is, on the left hand side as one descends That old slaughter house was not in existence in the year 1909

NON-EXISTENT OLD SLAUGHTER HOUSE

The following letter (*Ex Z 356*) shows that the old slaughter house was demolished sometime before the 22nd of June, 1909 It is a letter from the Vice-Chairman of the Darjeeling Municipality to the Sanitary Commissioner for Bengal requesting him to help with a design and plan for a slaughter house It reads "Sir, As the land below the slaughter house slipped at the last heavy rain endangering the said house, it was demolished, but as a new house is to be built soon, I have the honour to request that you will be good enough to help us with a design and plan of a slaughter house early to enable us to proceed with the work accordingly" It is not clear from this letter that the old slaughter house had been demolished before May, 1909, but in the argument before us it has been assumed that the demolition had occurred before the date of Ramendra Narayan Roy's cremation The site of the present slaughter house was formerly part of Mr Morgenstern's garden which was land belonging to the Municipality and leased out to Morgenstern The letters *Exts Z 356(5) and Z 356(8)* show that the site of the present slaughter house had not yet been taken back by the Municipality from Mr Morgenstern and was still, in May, 1909, and indeed up to July, 1910, part of Mr Morgenstern's garden It has been admitted that the new slaughter house was not, in fact, erected on the present site until long long after May, 1909 It is clear, therefore, that persons who fled from the cremation ground in May, 1909, could not have sheltered in the new slaughter house, and it is inconceivable that they could have gone to the site of the old slaughter house, even if the old slaughter house was then in existence Mr Chatterjee on behalf of the plaintiff has argued that Darjeeling must have had a slaughter

house at that time, and that, therefore, there must have been a temporary slaughter house somewhere and these witnesses probably sheltered in that temporary slaughter house From the evidence on record there is no reason whatever to believe that any such temporary slaughter house existed, and there is certainly no reason to believe it existed on the side of the old Sudhir Kumari Road The land to the south of the Sudhir Kumari Road was then Mr Morgenstern's garden which had not been taken back by the Municipality, and, therefore, could not have been used at that time as the site of a temporary slaughter house The northern side of Sudhir Kumari Road is on the very brink of the deep ravine to which reference has already been made It seems to me clear that there was in May, 1909 no slaughter house on the road between the old cremation ground and the inhabited buildings to the north to which people could have fled for shelter

NO SHEDS TO SHELTER IN

In this connection it is desirable to note that some other witnesses have stated that they took shelter in a shed in Morgenstern's garden Morgenstern was examined as a witness by the defendants and deposed that there was no such shed at that described by the plaintiff's witnesses His evidence is that "in 1909 we had a number of glass houses and conservatories in our vegetable garden, no sheds or huts " Later, however, in answer to a question from court he states that they had some servants' quarters by which he meant quarters of malis, servants and syces, and these were situated about 20 or 30 yards to the north and west of his residence

They were in the direction to the east and south of Sudhir Kumari Road These quarters were made of corrugated sheeting and plain sheeting Some of the witnesses who deposed that they fled from the cremation ground have stated that in their flight they went up the Sudhir Kumari Road, and then leaving the road, they went by a hill-track or *chorebatar* until they came to a shed Among these is Kiran Mustapha This gentleman describes the shed as a shed near the slaughter house But it is obvious that he could not have gone to any shed which was near the slaughter house The learned judge in his judgment has stated that the sheds in which these witnesses sheltered are precisely the huts to which Mr Morgenstern referred in his evidence I am unable to believe that the living quarters of malis and servants could be the sheds described, or that these people could take refuge in such living quarters without knowing that they were dwelling huts and without the knowledge of the inmates of those huts The inference drawn by the learned trial judge seems to me wholly unjustified, and the evidence on record goes to show that there were in fact no such sheds for the witnesses to shelter in as the witnesses alleged

UNCONVINCING EVIDENCE OF OTHER WITNESSES

The evidence of the other witnesses to the evening cremation seems to me also wholly unconvincing It is not possible to say from their evidence that they are necessarily untruthful, but the conduct they ascribed to themselves and the manner in which they deposed is wholly unconvincing For instance, Kiran Mustapha, one of the witnesses who stated that he attended the cremation procession and returned to the cremation ground to find that the body was missing, deposed that he heard subsequently that the